JUL 13 1955
JOHN T. FEY, Clerk

PETITION FOR CERTIORARI

IN THE

Supreme Court of the United States

October Term, 1955

No. 251

THE GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION and ALFRED A. BIDDLE,

Petitioners,

v.

THE UNITED CORPORATION and THE SECURITIES AND EXCHANGE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1955. NO.

The General Protective Committee for the Holders of Option Warrants of The United Corporation and Alfred A. Biddle,

Petitioners,

v.

The United Corporation and the Securities and Exchange Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The General Protective Committee for the Holders of Option Warrants of The United Corporation[1] and Alfred A. Biddle, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on April 16, 1956.

[1] The General Protective Committee for the Holders of Option Warrants of The United Corporation is hereinafter referred to as the "Committee", The United Corporation as "United", the Securities and Exchange Commission as the "Commission", the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15. U. S. C. §§ 79 *et seq.* as the "Act", and Public Utility Holding Company Act Releases of the Commission as "H. C. A. Rel.".

CITATIONS TO OPINIONS BELOW.

The findings and opinions of the Commission, H. C. A. Rel. 10,614, and, on rehearing, H. C. A. Rel. 12,621, are unreported. The relevant extracts therefrom are printed in Appendix A, p. 1a. The opinion of the United States District Court for the District of Delaware, printed in Appendix A, p. 25a, is reported in 128 F. Supp. 725. The opinion of the United States Court of Appeals for the Third Circuit, printed in Appendix A, p. 51a, is reported in 232 F. 2d 601.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit (Appendix A, p. 64a) was entered on April 16, 1956. The jurisdiction of this court is invoked under 28 U. S. C. § 1254 (1), 62 Stat. 928.

QUESTIONS PRESENTED.

A registered public utility holding company filed a plan for compliance with Section 11(b) of the Public Utility Holding Company Act of 1935 which requires the simplification of holding company systems. The plan provides that the required compliance shall be accomplished by the company ceasing to be a holding company and becoming an investment company, which it has done. The company amended the plan to include a provision cancelling, without compensation to warrant holders, all its outstanding warrants to purchase shares of its stock, but leaving its stock outstanding without change. The questions presented are:

1. Does the Act permit the company to add to the plan the provision forfeiting the warrants?

2. Does the fact that the warrants are of little value and for that reason might be deceptive to future pur-

chasers thereof make the forfeiture "necessary to effectuate the provisions of Section 11(b)" of the Act on the ground that the warrants were an undue or unnecessary "complication" in the "structure" of a former holding company?

3. Where to leave the warrants outstanding is fair to the stockholders, the only others affected by the plan, is the forfeiture fair and equitable to the warrant holders?

STATUTE INVOLVED.

The statutory provisions involved are Subsections (a), (b), and (e) of Section 11 of the Act:

Simplification of Holding-Company Systems.

Sec. 11. (a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to

limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however*, That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the busines of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take

such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

* * * * * * *

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities,

or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisidiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

STATEMENT.

United is an investment company. Its outstanding securities are 14,072,149.5 shares of common stock and perpetual warrants to purchase 3,732,059 additional such shares at a price which must be adjusted to $19.25 per share.[1] The warrants were duly issued for value in 1929.

[1] The exercise price stated in the warrants is $27.50, but this must be reduced to $19.25 due to a capital distribution made by United, with Commission approval, to its common stockholders in 1949 under the compulsion of Section 11(b) of the Act. Appendix A, pp. 13a, 37a, note 21.

when United was incorporated under the laws of Delaware, and have been widely traded in almost ever since on the New York Curb Exchange with the approval of the Commission, both before and after its 1943 order hereinafter mentioned. Appendix A, p. 24a.

United, by reason of its ownership of over 10% of the voting securities of various public utility companies, was in 1943 a "holding company" as defined in the Act. It had registered as such under the Act. It then had outstanding 2,488,712 shares of preference stock in addition to its common stock which, though it was "under water", had voting control of United. On August 14, 1943, the Commission ordered United to comply with Section 11(b) of the Act by ceasing to be a holding company and (in order to correct its inequitable distribution of voting power) changing its capitalization to one class of stock. The order did not relate to the warrants, which confer no voting rights.[1] *The United Corporation*, 13 S. E. C. 854, 877-8, 899.

United, having decided with Commission approval to become an investment company, acquiesced, and by November 15, 1949, had retired all of its preference stock and disposed of all but two of its former direct public utility

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[1] The Commission concluded, at page 899 of 13 S. E. C.:

"We * * * will require *only* that United correct the inequitable distribution of voting power within its own company by recapitalizing with a single class of stock and that it shall cease to be a holding company." —emphasis supplied.

In this case the Commission found:

"United has a single class of stock and there is no inequitable distribution of voting power." Appendix A, p. 22a.

In 1949 the Commission said:

"United has stated, and we agree, that our opinion and order of August 14, 1943 did not expressly indicate whether the option warrants would have to be eliminated or modified in the process of its recapitalization on a one-stock basis." *The United Corporation*, 30 S. E. C. 398, 403.

The 1943 order could not relate to the warrants under *City of New York v. New York, New Haven & Hartford R. R. Co.*, 344 U. S. 293, 296, 73 S. Ct. 299, 301 (1953), because no notice (except by publication) of the 1943 proceedings was given to the holders of the warrants, which are in registered form. (There is nothing in the present record to show that such notice was given and we have been advised by counsel for United that the record before the Commission in the 1943 proceedings does not disclose that any was given.)

subsidiaries. On July 15, 1952, it disposed of the stock of its last public utility subsidiary and thereupon ceased to be a "holding company" or part of a "holding company system." Appendix A, pp. 34-5a. On January 16, 1956, the Commission issued its findings, opinion and order (Appendix B, pp. 65a, 72a) so declaring, whereupon it ceased to be a "registered holding company."[1]

Meanwhile, on November 16, 1949, United had filed with the Commission its final plan for compliance with Section 11(b) of the Act. The plan has always expressly provided for its continuance in existence as an investment company with its common stock unchanged. It originally provided that new warrants to purchase common stock be issued in exchange for its outstanding warrants. Appendix A, pp. 14a, 16a, note 48.

On June 13, 1950, United filed an amendment to the plan, proposing instead the outright cancellation of the warrants without compensation to warrant holders.[2]

Promptly thereafter the Committee was formed. It represents approximately 1,000 holders of warrants to purchase approximately 1,200,000 shares of United's common stock. Alfred A. Biddle, the other petitioner, owns warrants to purchase 25,400 shares of such stock. The Committee appeared at the hearings before the Commission on the forfeiture of the warrants and objected thereto, and it introduced evidence and presented argument in support of its position that the warrants should be permitted to remain outstanding.

On June 15, 1951, the Commission issued its findings and opinion. Appendix A, p. 1a, H. C. A. Rel. 10,614. It found that United's common stock had increased in market

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[1] Rehearing was denied. *The United Corporation*, H. C. A. Rel. 13,102 (February 16, 1956); appeal pending.

As the court below pointed out (Appendix A, p. 56a, note 11), there is a difference between a *registered holding company* and a *holding company*. A *registered holding company* is a *holding company* which has registered with the Commission. Section 2(a)(12) of the Act. Once a company becomes a *registered holding company* it remains such even though it has ceased to be a *holding company* until the Commission orders otherwise under Section 5(d) of the Act.

[2] The plan as so amended is hereinafter referred to as the "Plan".

value from 18¾¢ per share in 1941 to $4.75 per share in 1951[1] Appendix A, p. 24a. The Commission announced, however, that it was unable to find that there is a reasonable expectation that in the foreseeable future the market price of the stock will increase from $4.75 to $19.25, the adjusted exercise price of the warrants. It concluded that, for this reason, though the warrants are of small, but conceded, value[2] they represent "an extremely tenuous right * * * inherently deceptive to investors" and therefore constitute a "*corporate*" (not a system) complexity removable under the Act. It further found, not that to leave both the stock and the warrants outstanding would be unfair to the stockholders, but that the warrant holders "are not entitled, under the standards of fairness and equity, to any *participation in the reorganization* of United." Appendix A, pp. 4-5a, 21a—emphasis supplied. Accordingly, on June 26, 1951, the Commission approved the Plan. *The United Corporation*, H. C. A. Rel. 10,643. Application by the Committee for rehearing was denied on August 17, 1954. *The United Corporation*, H. C. A. Rel. 12,621.[3]

On application of the Commission, filed on October 11, 1954, long after United had ceased to be a holding com-

[1] In 1955 it reached $7.375 or *39 times* its 1941 low. The court will take judicial notice of such published financial statistics. *Park & Tilford, Inc.* v. *Schulte*, 160 F. 2d 984, 990 (C. A. 2, 1947), certiorari denied 332 U. S. 761, 68 S. Ct. 64 (1947).

[2] The market value of the warrants, when they were traded in on the New York Curb Exchange, fluctuated, generally speaking, in accordance with fluctuations in the market value of the stock. When the stock was selling for about $7 a share, as it is today, the warrants (then exercisable at $27.50 per share) sold for about $2 each, an aggregate of $7,464,118. Appendix C, pp. 73-6a. There was other substantial evidence that the warrants are valuable. Appendix A, pp. 16-8a, 24a, 39a.

[3] Meanwhile, on appeal taken by stockholders of United from the order of the Commission approving the Plan, the Court of Appeals for the District of Columbia Circuit had affirmed the Commission's order. *Doenning* v. *S. E. C.*, 203 F. 2d 611 (1953), certiorari denied 346 U. S. 930, 74 S. Ct. 319 (1954). This decision, insofar as it approved of the forfeiture of the warrants, was reversed by this court for lack of jurisdiction. *General Protective Committee for the Holders of Option Warrants of The United Corporation* v. *S. E. C.*, 346 U. S. 521, 74 S. Ct. 261 (1954). The Committee's petition for certiorari had been granted "limited to the question as to the jurisdiction of a court of appeals or a district court to review orders of the Securities and Exchange Commission." 346 U. S. 810, 74 S. Ct. 42.

pany or part of a holding company system, the Plan was approved and enforced by the United States District Court for the District of Delaware in an opinion filed January 17, 1955 (Appendix A, p. 25a, 128 F. Supp. 725) and order entered March 17, 1955. Appendix A, p. 44a. On April 16, 1956, three months after United had ceased to be a registered holding company, this order was affirmed by the United States Court of Appeals for the Third Circuit. Appendix A, pp. 51a, 64a, 232 F. 2d 601.

This petition seeks review of that order of the Court of Appeals.

REASONS FOR GRANTING THE WRIT.

I. Whether a registered public utility holding company, in the process of complying with the simplification requirements of Section 11(b) of the Act by ceasing to be part of a holding company system, can also forfeit a class of its outstanding securities is an important federal question undecided by this court, decided below under a misapprehension of the prior decision of this court in this case.

The Act was enacted for the sole purpose of regulating public utility "holding companies" and "holding company systems". Section 1(c) of the Act. A "holding company" is a company which owns 10% or more of the voting securities of a gas or electric operating utility company, and a "holding company system" means a "holding company together with all its subsidiaries". Sections 2(a)(7) and 2(a)(9) of the Act.

Section 11(b) of the Act sets up certain standards with which every holding company *system* is required to comply. Briefly stated, each such *system*, under Section 11(b)(1), must confine its operations to a single inte-

grated public utility system, and, under Section 11(b)(2), must not have an unfair distribution of voting power or unnecessary complications in the *system* structure.

> "* * * [T]he mandates of § 11(b)(2) are directed solely to public utility holding company systems that use the channels of interstate commerce * * *." *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90, 100, 67 S. Ct. 133, 140 (1946).

It is therefore clear that a holding company can comply with Section 11(b) in either of two ways: (1) it may effect the internal reforms (with respect to integration of properties, voting power, and undue system complications) necessary to bring its system into compliance with all three of the prescribed statutory standards, so that it may thereafter continue as a holding company subject to the regulation by the Commission provided in the Act for such companies; or (2) it may reduce its holdings of stock of operating public utility companies to less than 10% so that it ceases to be a holding company or part of a holding company system and is entirely outside of the field subject to regulation by the Act.

If a holding company decides with Commission approval to adopt the second course, it cannot, before or after ceasing to be a holding company by completing its transformation into an investment company, be required to comply with the provisions to which it would have been subject had it adopted the first course; and if it cannot be compelled to do so, of course it cannot unilaterally elect to do so contrary to state law and against the will of its security holders.

This court so concluded in this case in 1954, saying:

> "The Congress contemplated that under this Act some holding companies might *satisfy the requirements of § 11* by divesting themselves of control and

converting themselves into investment companies." *General Protective Committee for the Holders of Option Warrants of The United Corporation* v. *S. E. C.*, 346 U. S. 521, 530, 74 S. Ct. 261, 266.—emphasis supplied.

This conclusion of this court, that ceasing to be a holding company is of itself all that a holding company need do to comply with Section 11(b) of the Act, is confirmed by the legislative history of the Act. Section 11(b) of Senate Bill No. 2,796, 74th Congress, 1st Session, was substantially the same as Section 11(b) of the Act.[1] Congressman Edward C. Eicher pointed out in a minority committee report on the House of Representatives version of the Act:

> "*As a matter of fact the Senate Bill* [*No. 2,796*] *makes it possible for any giant holding company to maintain intact its existing corporate structure, however intricate and confusing,* and to retain intact the ownership of all of its assets, however heterogeneous and geographically diverse, *upon one condition. That condition is* that it satisfies the Securities and Exchange Commission *that it has ceased to be a holding company* within the meaning of the bill." *House Report No. 1,318, 74th Congress, 1st Session*, p. 50; *Congressional Record*, Aug. 15, 1935, p. 13,279.—

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[1] Section 11(b) of this bill is printed in Appendix D, p. 77a. It differs from Section 11(b) of the Act, *supra* p. 3, only in respects here immaterial, such as the inclusion in paragraph (2) of Section 11(b) of the Act of the "great-grandfather" clause as a substitute for paragraph (3) of the bill, the reduction of the five year waiting period to three years, and slight changes in the powers given to the Commission at the end of that period. This bill and committee reports thereon have been regarded by this court as proper sources of aid in construing Section 11(b)(2) of the Act. *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90, 114, 117, 119, 67 S. Ct. 133, 146, 148, 149 (1946).

emphasis supplied.[1] See also *Senate Report No. 621, 74th Congress, 1st Session*, pp. 11, 14.

The Court below decided this federal question in a way in conflict with the decision of this court when this case was here before. The court below held that ceasing to be a holding company satisfied the requirements of Section 11(b)(1). But it held that *in addition*, after its transformation from a holding company into an investment company, a registered holding company must comply with the requirements of Section 11(b)(2), and therefore can take advantage of those requirements to rid itself of a class of securities which the management of the company desires to confiscate without compensation to the holders thereof. The court below said:

> "Becoming an investment company will satisfy Section 11(b)(1), but it does not necessarily satisfy 11(b)(2), which requires the simplification of corporate structures. United was and is a registered holding company and, as such, clearly falls within the command of Section 11(b)(2)." Appendix B, p. 56a.

Section 11(b)(2) does not require the simplification of *corporate* but only of *system* structures. United has not been a registered holding company since January 16, 1956. The court did not explain how the public policy and purpose expressed in Section 11(b) of the Act of simplifying holding company systems (pointed out by this court in *American Power & Light Co.* v. *S. E. C.*, quoted *supra*, p. 11) is furthered by simplifying the corporate structure of a company which will shortly cease or has already ceased to be a registered holding company and has long ceased to be part of any holding company system.

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[1] These remarks of Congressman Eicher were quoted with approval as a proper source of aid in construing Section 11(b) of the Act by Hon. Jerome N. Frank when he was chairman of the Commission. *Electrical World*, Vol. 113, No. 15, News Issue, April 13, 1940, pp. 3-4.

The conclusion of the court below is in conflict with the prior decision of this court in this case quoted *supra* p. 11. It is also contrary to the provision of Section 11(b)(2) that

> "Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, *nothing in this paragraph shall authorize the Commission to require any change in the corporate structure* or existence *of any company which is not a holding company* * * *".—emphasis supplied.[1]

It is clear that if United had never been a holding company it could not have taken advantage of Section 11(b)(2) of the Act to accomplish its purpose of confiscating the warrants. It is also clear that United could not do so today, when it is not even a registered holding company.[2] It is submitted that when United decided with Commission approval to cease to be a holding company it charted its course under Section 11(b) of the Act and cannot alter it by first simplifying its corporate structure, as if it were to remain a holding company, by the forfeiture of a class of its outstanding securities, and that the contrary decision of the court below misapplied the 1954 decision of this court in this very case.

This is a question of great importance which has not been but should be clearly settled by this court.

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[1] Since United has no inequitable distribution of voting power (note 1, *supra* p. 7), it has been exempt under this sentence from the requirements of Section 11(b)(2) since July 15, 1952, when it ceased to be a holding company, though it remained a *registered* holding company till January 16, 1956. See note 1, *supra* p. 8.

[2] United has registered with the Commission as an investment company under the Investment Company Act of 1940, 54 Stat. 789, 15 U. S. C. §§ 80a-1 *et seq.* Not only does that act not permit or require the forfeiture of outstanding securities; its Section 18(d), 54 Stat. 819, 15 U. S. C. § 80a-18(d), expressly permits the *issuance* in reorganizations of perpetual warrants like United's in exchange for outstanding warrants, which the Commission has twice approved. *Tri-Continental Corporation*, Investment Company Act Release of the Commission No. 1,572 (1951); *Capital Administration Company, Ltd.*, Investment Company Act Release No. 1,845 (1953).

The first and perhaps the most important area of regulation of holding company systems under the Act involves the integration and simplification requirements of Section 11(b) of the Act. In this field in the last twenty years 839 companies with assets of $12,905,000,000 have been divested by registered holding companies and as a result have ceased to be subject to the Act as associates of registered systems.[1] 21st Annual Report of the Securities and Exchange Commission to the Congress for the Fiscal Year Ended June 30, 1955, pp. 51, 52, note 3.

At June 30, 1955, there were still 276 companies which were parts of active registered holding company systems. *Ibid.*, p. 53. Additional companies may become such. Indubitably many more of these companies will be divested or become exempt or otherwise free from this type of regulation. Some are in the process today.

If, before the occurrence of such changes in status, such as United's ceasing to be a holding company and becoming an investment company, these companies can modify their corporate structures to the extent, as here, of forfeiting a class of securities outstanding in the hands of the public, a new principle of law will have been established under which the contractual rights of thousands of security holders may be modified or confiscated, contrary to state law and against the will of the security holders.

It may be true that companies have, at the instance of the Commission or of their own volition, simplified their corporate structures or integrated their properties, without challenge in the courts, before becoming investment companies or otherwise free from this type of regulation; *e. g. Electric Bond & Share Company*, H. C. A. Rel. 10,640

[1] The number of companies so divested or otherwise freed from the Act in each of the last three fiscal years was: year ended June 30, 1955 — **53**. 21st S. E. C. Report, p. 52; 1954 — **65**. 20th S. E. C. Report, p. 51; 1953 — **46**. 19th S. E. C. Report, p. 52.

(1951). In many of such cases (*e. g., In re Community Gas & Power Co.*, 168 F. 2d 740 (C. A. 3, 1948), certiorari denied 334 U. S. 846, 68 S. Ct. 1516 (1948)), the simplification in question was an essential step in the consummation of the plan whereby the company ceased to be a holding company. None of such cases is a precedent here. The argument to the contrary is the well worn "boot-strap" argument, which Judge Pine, in the leading case of *Youngstown Sheet & Tube Co.* v. *Sawyer*, involving the seizure of the steel companies by the president of the United States, 103 F. Supp. 569, 575 (D. D. C., 1952), aptly disposed of by saying:

> "He (the defendant) next refers to seizures by former presidents, some during war and several shortly preceding a war, without the authority of statute, but it is difficult to follow his argument that several prior acts apparently unauthorized by law, but never questioned in the courts, by repetition clothe a later unauthorized act with the cloak of legality. Apparently, according to his theory, several repetitive, unchallenged, illegal acts sanctify those committed thereafter. I disagree."

This view was approved on appeal by this court. 343 U. S. 579, 588, 72 S. Ct. 863, 867 (1952).

If United should suggest that in certain cases plans providing that a holding company shall both cease to be such and also change its corporate structure have been approved by the courts, we point out that in no reported case has the legality or propriety of such a plan ever been passed on or decided by any court. Obviously, no such cases can be considered as precedents.

> "Even as to our own judicial power or jurisdiction, this Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not

bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio.*" *U. S.* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 38, 73 S. Ct. 67, 69 (1952).

It is submitted that registered holding companies should no longer be permitted to assume that the Act gives the Commission such jurisdiction and that this court, following its former decision in this case, should once and for all decide this important question.

II To forfeit a class of securities outstanding in the hands of present investors, merely to protect future investors from the temptation to purchase such securities, on the ground that they "complicated" the "structure" of a former holding company, is a grave departure from the accepted and usual course of judicial proceedings.

Before any plan under Section 11(e) of the Act can be approved or enforced, the Commission must find the plan "necessary to effectuate the provisions of subsection (b)" and the enforcing court must "approve such plan as * * * appropriate to effectuate the provisions of section 11".

Here the Commission and the two lower courts took the position that the forfeiture of the warrants is necessitated by the provision of Section 11(b)(2) which directs the Commission to require that "the corporate structure * * * of any company in the holding company system does not unduly or unnecessarily complicate the structure * * * *of such holding company system*".—emphasis supplied.

United's holding company system ceased to exist on July 15, 1952. Furthermore, neither the Commission nor either lower court found that the structure of its *system* (when it did exist), as distinguished from its own *corporate* structure, was complicated by the warrants. This omission of the Commission constitutes the omission of

a finding of an essential jurisdictional fact under the final sentence of section 11(b)(2) of the Act quoted *supra*, p. 14. *Yonkers* v. *U. S.*, 320 U. S. 685, 687-9, 692, 64 S. Ct. 327, 329-30, 331 (1944). Finally neither the Commission nor the lower courts found even United's own corporate structure "complicated" in the ordinary sense of that word.

The reasoning which led the Commission and the two lower courts[1] to take the position they did is as follows:

> (1) the chances that the market value of United's stock (about $7.00 a share today) will, in the foreseeable future, reach the adjusted exercise price of

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[1] "From the findings of the S. E. C. and the statements of counsel at oral argument [Appendix E, p. 79a], the emphasis was not that the outstanding warrants would complicate the internal structure of United but the cancellation was in the interest of future purchasers; and the existence of warrants should be terminated because they are an undesirable kind of security of uncertain value." Opinion of the District Court, Appendix A, p. 36a.

"[T]he Commission concluded that the warrants would be inherently deceptive to investors * * * The appellants [petitioners] contend that the complication referred to in Section 11(b)(2) has no relationship to the public or to future investors and that the complication must relate to internal matters affecting the corporation or its security holders. To begin with, such an argument flies directly into the hard facts of Congressional concerns in passing the Public Utility Holding Company Act. * * *

"* * * Section 11(e) provides that holding companies may submit voluntary plans 'in accordance with such rules and regulations or order as the Commission may deem necessary or appropriate *in the public interest or for the protection of investors*' * * *.

"There can be no doubt that the complication referred to in Section 11(b) can properly apply to outstanding warrants which have been found valueless and which by their terms confer an extremely tenuous right upon the holders." Opinion of the Court of Appeals, Appendix A, pp. 57a, 59a.

The Commission and the courts below did not consider whether present investors, *i. e.* the warrant holders, are not entitled to at least as much protection as future investors, particularly when so many of the present investors bought their warrants when United was under Commission supervision as a registered holding company and the Commission permitted trading in them on the New York Curb Exchange. Sections 1 and 7 of the Act (enacted "for the protection of [*inter alia*] investors"), relied on below, are designed to protect future investors and others *on the issuance of new securities*. None of them even suggests that the requirements imposed by them on new issues justify *the forfeiture of securities outstanding in the hands of present investors.*

the warrants ($19.25), so that the warrants will become worth exercising, are slim or nil;[1]

(2) the warrants therefore have only a small, though conceded, value;[2]

(3) despite this low value, the investing public may disagree with the Commission and think that the warrants have a chance of some day becoming worth exercising, that they meanwhile will always have some value and be resaleable, and hence that they are worth buying if the price is low enough;[3]

(4) the warrants are therefore "deceptive" securities which may mislead future investors;

(5) future investors must be protected from the danger of being tempted to invest in such deceptive securities; and

---

[1] But see note 1, *supra* p. 9. The Commission has previously made the mistake of undervaluing securities. In 1944, it found the common stock of Standard Gas and Electric Company worthless and approved a plan for its forfeiture. Later the plan was amended to provide assets which became worth $50,000,000 for the holders of such stock and approved and enforced. *Standard Gas and Electric Co.*, H. C. A. Rel. 12,878 (1955) pp. 5, 7. Compare the famous Missouri Pacific Railroad case where the Interstate Commerce Commission three times ruled its common stock worthless and in the eleven years after the first such ruling its average earnings were $10 per share per year.

> "* * * both the Executive and the Congress have recorded dissatisfaction with the heavy incidence of forfeiture decreed by courts' * * *." *Chemical Bank & Trust Co. v. Group of Institutional Investors*, 343 U. S. 982, 986-7, 72 S. Ct. 1018, 1019-20 (1952).

[2] See note 2, *supra* p. 9.

[3] The public disagreed with the Commission and thought so constantly between 1920 and 1951 (when trading in the warrants on the New York Curb Exchange was suspended) during which period the warrants were traded in daily in the New York Curb Exchange with the Commission's approval. Appendix A, p. 24a. If the Commission had intended to eliminate the warrants, it should have taken steps to do so under Section 11(b)(2), if otherwise applicable. By failing to do so in its 1943 order, awaiting United's 1950 amendment to its Section 11(e) plan, and permitting trading in the warrants until June, 1951, it misled countless investors.

(6) for this reason alone, the warrants must be forfeited and the present investors therein must have confiscated the value, whatever it may be, of their investment, whenever made.

To confiscate a person's property simply because it is of little value and someone else may be foolish enough to buy it is an extraordinary remedy for a situation that is and always will be commonplace. The Congress certainly never intended, by prohibiting "complications" in the "structure" of holding company systems in an Act expressly designed "for the protection of investors", to require or authorize the forfeiture of investments for such a reason.

> "Of course, Congress would wish, in simplifying a holding company system capital structure, to preserve values to investors, not to destroy them". *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 636-7, 65 S. Ct. 483, 490 (1945).

Simply to state the Commission's proposition should be enough to refute it. Particularly is this true when property of this exact type (perpetual warrants to buy common stock) is traded in daily on and off the leading stock exchanges and the Commission itself has approved of the issuance of identical securities under the only act administered by it to which United is now subject.[1]

It is submitted that the court below has so far sanctioned a departure by the District Court below from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

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[1] See note 2, *supra* p. 14.

III. Where the stock which warrant holders are entitled to purchase remains outstanding without change so that the warrants' continued existence is fair to stockholders, Niagara Hudson Power Corporation v. Leventritt, 340 U. S. 336, does not justify approval of the forfeiture of the warrants.

Under Section 11(e) of the Act, before the Commission or the courts can approve of or enforce a plan, they are required to find it "fair and equitable" to the "persons affected" thereby. The only such persons are the stockholders and warrant holders of United.

The warrants are not wholly worthless.[1] Fairness to warrant holders therefore requires that the warrants be permitted to remain outstanding, *unless it is unfair to the stockholders to do so.*

But to permit the warrants to remain outstanding, the course for which petitioners have continuously contended, is obviously fair to stockholders and warrant holders alike. This leaves both the stockholders and the warrant holders with precisely what they bargained for when they bought their securities. It gives nothing to either class at the expense of the other. It preserves all the existing rights of each class. If, in the future, the market value of the stock should exceed the exercise price of the warrants, the warrant holders will be entitled to the benefit resulting from being able to purchase stock at the exercise price, as is their due. If the stock should never reach this price, the warrants will never be exercised and the stockholders will not be affected by their continued existence.

On this point, the Commission and the court below decided this federal question in a way in conflict with the applicable decision of this court, *Niagara Hudson Power Corporation* v. *Leventritt*, 340 U. S. 336, 71 S. Ct. 341 (January 15, 1951).

---

[1] See note 2, *supra*, p. 9.

In that case the issuer of perpetual warrants had been dissolved, its assets had been distributed, and the common stock of a new company had been issued to its stockholders. All parties necessarily therefore agreed that its existing warrants (which were of low, but conceded, value, as in this case) could never be exercised and had been effectively made void as claims against the issuer. No one suggested that they remain outstanding or that similar warrants be issued by the new company. The question, and the only question, before this court was whether or not the warrant holders were entitled to be compensated for their loss.

The only suggested method of compensating the warrant holders in that case was to give them cash or stock of the new company. But the new company belonged 100% to the stockholders of the old company and to do that would take away from the stockholders something which the stockholders then owned, and would give it to the warrant holders. This court pointed out *four times* in its opinion that it was only this fact in the *Niagara Hudson* case which justified the cancellation of the warrants (which it approved), saying:

> "The Commission cannot find justification for recognizing any present value in the warrants *at the expense of the common stock.* * * *
>
> "[I]f the market value of the common stock is less than $15 per share and there is no ground for a reasonable expectation that, within the foreseeable future, the value will exceed $15 per share, then an option to buy it at, for example, $1,000 per share obviously would be worthless if the measure of its value depends only upon its convertability into common stock. With such facts, it is difficult to see how the Commission could justify either the continuance of the warrants or any compensation for them *at the expense of the existing common stock.* * * *

"[The existence of a market value for the warrants] does not provide an adequate reason for allowing a value to the warrants, *at the expense of the common stock, in a reorganization under this Act.* * * *

"*The cash allowance* [*which the Commission*] *gives to one security it must take from another.*" *Niagara Hudson Power Corporation* v. *Leventritt*, 340 U. S. 336, 339, 344, 346, 347, 71 S. Ct. 341, 342, 343, 345, 346 (1951).—emphasis supplied.[1]

No such problem is presented in the case at bar. Here *United is not being reorganized. Its stock is to remain outstanding without change.* The warrant holders are not asking for compensation for the loss of their warrants. There is no suggestion that anything be taken away from the stockholders and given to the warrant holders. The shoe is on the other foot. United's Plan, by providing for the forfeiture of the warrants, unquestionably takes something—namely, the value of the warrants, whatever that may be, small or large—away from the warrant holders and gives it to United's stockholders.

"Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding wind-fall to another class of security holders." *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 637, 65 S. Ct. 483, 490 (1945).

No justification can be found in the *Niagara Hudson* case for the approval of United's Plan. That case was decided on the ground that to compensate warrant holders

[1] The same point was recognized in *In re Commonwealth & Southern Corporation*, 184 F. 2d 81 (C. A. 3, 1950), certiorari denied, 340 U. S. 929, 71 S. Ct. 489 (1951), which also approved a plan to cancel perpetual warrants. There the court said, at p. 84 of 184 F. 2d:

"[T]he SEC cannot, *at the expense of the other security holders*, place an affirmative valuation upon option warrants which have no chance * * * of being exercised * * * within the reasonably foreseeable future." —emphasis supplied.

would be unfair to stockholders. Both of the lower courts misapplied that decision of this court. The warrants should, like this stock, be permitted to remain outstanding as is demonstrably fair to both the stockholders and the warrant holders.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners.

July 13, 1956.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

SUPREME COURT, U.S.
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 251

THE GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION and ALFRED A. BIDDLE,

Petitioners,

v.

THE UNITED CORPORATION and THE SECURITIES AND EXCHANGE COMMISSION,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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JULY 10, 1956

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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APPENDIX A

 Extracts from Findings and Opinion of Commission.

RELEVANT EXTRACTS FROM FINDINGS AND OPINION OF COMMISSION.

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.

HOLDING COMPANY ACT OF 1935
Release No. 10614

In the Matter of THE UNITED CORPORATION File No. 54-184 (Public Utility Holding Company Act of 1935)	Findings and Opinion of The Commission

* * * * * * *

The United Corporation ("United"), a registered holding company, seeks approval of a plan and amendments thereto filed pursuant to Section 11 (e) of the Public Utility Holding Company Act of 1935 ("the Act"). The plan is proposed as a means of effecting compliance with Section 11(b) of the Act and with our order of August 14, 1943, issued thereunder, wherein we directed United to change its capitalization to one class of stock and take such action as would cause it to cease to be a holding company.

* * * * * * *

Hearings were held on the plan as originally filed and as amended, and thereafter various participants in the proceedings filed briefs and the Division of Public Utilities ("the Division") filed a recommended findings and opinion, to which certain of the participants filed exceptions. We heard oral argument.

Upon an independent review of the record, we make the following findings:

Appendix A

Extracts from Findings and Opinion of Commission. [redacted]149a

I. Description of United.

United, a corporation organized under the laws of the State of Delaware in 1929, is exclusively a holding company, with the bulk of its holdings consisting of securities of companies in the public utility field.

* * * * * * *

The following is a condensed balance sheet of United as of December 31, 1950:

Assets

Investment portfolio[a]	$38,736,427
Government bonds	99,900
Cash	2,472,048
Total Assets	$41,308,375

Liabilities

Common stock, $1 par value	$14,529,492
Accounts payable	157,827
Taxes, other than income tax	46,033
Federal income tax	209,551
Capital surplus	23,336,122
Earned surplus (since 12-31-46)	3,029,350
Total Liabilities	$41,308,375

In addition to its common stock, of which 14,529,491.5 shares are outstanding, United has outstanding option warrants entitling the holders thereof to purchase 3,732,059 shares of common stock at any time at a price of $27.50 per share.

As of December 31, 1950, United's net assets, including its investments at their market value as of that date, consisted of the following:

[a] As of June 30, 1938, United wrote down the carrying value of its investments to their market value as of December 31, 1937. The investment portfolio is now carried in the main at values based on this restatement, with subsequent additions at cost.

Appendix A

Extracts from Findings and Opinion of Commission.

	No. of Shares held	% of total voting stock	Indicated market value
Niagara Mohawk			
Class A	42,483.1)		$ 1,104,561
Common	1,072,830.72)	11.9	22,395,341
South Jersey Common	154,231.8	28.3	1,812,224
American Water Works Company, Inc. Common	46,870	1.7	433,548
The Cincinnati Gas & Electric Company Common	17,359	—	564,168
Columbia Common	814,136	5.5	10,380,234
Consolidated Edison Company of New York, Inc. Common	204,680	1.5	6,140,400
Consolidated Gas Electric Light and Power Company of Baltimore Common	13,755	—	335,278
The Lehigh Coal and Navigation Company Capital	48,705	2.5	517,491
Ohio Edison Company Common	12,688	—	385,398
Philadelphia Electric Company Common	3,667	—	95,342
Public Service Electric and Gas Company Common	406,129	3.5	8,731,774
The Southern Company Common	44,065	—	495,731
UGI Capital	90,832	5.8	2,486,526
The West Penn Electric Company Common	64,872	2.0	1,759,653
Total Indicated Market Value			$57,637,669
Add: U.S. Securities and Cash; less accounts payable and accrued taxes, net:			2,158,537
			$59,796,206
Equals, per share, on 14,529,491½ shares of Common			$4.12

• • • • • • •

United's present plan has been submitted to effect compliance with our 1943 order, as well as with the undertaking referred to in our 1949 opinion, and is designed to complete the transformation of United into an investment

company. United has stated that if its plan is approved it intends to register under the Investment Company Act of 1940, and that upon such registration it would be classified as a "non-diversified, closed-end, management company" as defined by that Act.

III. The Plan.

The principal provisions of the plan, as amended, are in substance as follows:

* * * * * * *

(6) The outstanding option warrants to purchase common stock of United will be cancelled.

* * * * * * *

IV. Applicable Statutory Standards.

In order to approve a plan submitted under Section 11 (e) of the Act we must find that it is "necessary" to effectuate the provisions of Section 11 (b) of the Act and is "fair and equitable" to all persons affected by it. We must also test the proposals in the plan by the other applicable standards of the Act.

We have held that a plan is "necessary" under Section 11 (e) if it provides an appropriate means for achieving the results required by Section 11 (b), although it might not be the only plan capable of effectuating the provisions of the statute. As previously pointed out, our order of August 14, 1943, directed United to change its capitalization to one class of common stock, and to take such action in a manner consistent with the Act as would cause it to cease to be a holding company. A major step in compliance with that portion of our order directing recapitalization was effected through the retirement of United's outstanding preference stock, so as to leave only common stock and option warrants outstanding. The presence in United's structure of the latter security, which, as is more fully set forth in connection with our discussion

of the fairness of the plan, has no reasonably foreseeable investment value, constitutes a corporate complexity which must be eliminated under the standards of Section 11 (b) (2). Its cancellation, as proposed by the plan, will complete the required simplification of United's corporate structure.

As a method of compliance with our direction that United take such action as will ensure that it would cease to be a holding company, United proposes that it reduce its holdings of voting securities in each of its present and former subsidiaries to below 5% of the amounts outstanding, sell all of its holdings in South Jersey, and change the nature of its business to that of an investment company. In our 1943 opinion we recognized the possibility that compliance with the standards of Section 11 (b) (2) might be achieved through the transformation of United into an investment company.

* * * * * * *

Under all the circumstances, we are of the opinion that United's proposed program of transforming itself into an investment company following a reduction of its holdings in its present and former subsidiaries may be considered appropriate action to cease to be a holding company and therefore necessary to effectuate the provisions of Section 11 (b).

* * * * * * *

Assets.

A condensed balance sheet of United as at December 31, 1950, together with condensed pro forma balance sheets reflecting the consummation of the plan on various assumptions with respect to acceptance of the proposed withdrawal offers by the common stockholders of United, is attached hereto as Appendix A. United's investment portfolio, as shown on the actual balance sheet, was carried at $38,736,427, which is based on market quotations

as of December 31, 1937, of securities then owned plus subsequent additions at cost.[17]

• • • • • • •

Including cash, United's net assets as of December 31, 1950, amounted to approximately $59,800,000 or $4.12 per share.

• • • • • • •

Earnings.

The comprehensive adjustments that have been made with respect to the financial structures of United and of the companies whose securities United owns, as well as the changes proposed by United as to its future operations, make an extensive analysis of the past earnings and dividend record of little significance in the evaluation of the present earnings and dividends position of United's common stock. Nevertheless, before proceeding with a discussion of United's future plans, it is appropriate to review very briefly the recent history of United's earnings which are set forth below:

Year	Total Income	Expenses	Net Income	Preference Dividend[a] Requirements	Balance For Common Stock	
					Amount	Per Share
1946	$3,061,095	$626,602	$2,434,493	$3,408,597	$ (974,104)	(6.7)¢
1947	4,656,443	885,814	3,770,629	3,408,597	362,032	2.5 ¢
1948	6,408,763	760,743	5,646,020	3,408,597	2,237,423	15.4 ¢
1949	3,334,727	704,736	2,629,991	852,142	1,777,849	12.2 ¢
1950	3,781,878	656,937	3,124,941	—	3,124,941	21.5 ¢

[a] The preference stock was retired on April 30, 1949.

The increase in total income from 1946 to 1948 is for the most part attributable to the reorganizations of United's original subsidiary holding companies, whereas the sharp reduction in total income since 1948 reflects the distribution of portfolio securities for the retirement of United's preference stock, offset in part by the exchange

[17] As of June 30, 1938, United underwent an accounting reorganization, which included writing down the carrying value of its investments to their market value as of December 31, 1937, and the reduction of its common capital from a stated value of $5 per share to a par value of $1 per share.

early in 1950 of United's holdings of non-dividend-paying common stock of Niagara Hudson for common stock of Niagara Mohawk which is now paying dividends at the annual rate of $1.40 per share. United in 1950 received the full year's dividends in the amount of $1,501,962. Expenses for the five-year period shown in the table averaged approximately $725,000 per year, which included expenses incident to the reorganizations mentioned above. During the period when United's preference stock was outstanding, common stock earnings after preferred dividend requirements increased from a deficit in 1946 to 12¢ per share in 1949, with the higher earnings of 15¢ per share in 1948 accounted for in part by the receipt of dividend arrears on preferred stock of Niagara Hudson then owned by United. The earnings of 21.5¢ per share in 1950 reflect both the retirement of the preference stock and the exchange of Niagara Hudson holdings referred to above. Dividends on United's common stock were paid in 1950 in the amount of 20¢ per share.

The earning capacity of United, based on the securities held as of December 31, 1950, and current dividend rates thereon, is shown in Appendix C attached hereto. On this basis United's annual income prior to consummation of the plan would total $3,704,045 or 25.5¢ per share and net income would be $3,057,167 or 21¢ per share. Appendix C also shows the effect of the plan on United's earning capacity, assuming the same amount of withdrawals as reflected in Appendices A and B, and assuming a 6% return on the net cash increases resulting from the plan as shown in Appendices A and B. On these assumptions United's income would be virtually unaffected as a result of consummation of the plan if there were no withdrawals, total income per share increasing slightly to 25.7¢ and net income to 21.3¢. However, as shown in Appendix C, total income per share would increase to 26.3¢ if there were withdrawals in the partial amounts assumed and to 27.6¢ if there were full acceptance of the

withdrawals offers. Similarly, net income per share would increase to 21.7¢ with the partial withdrawals and to 22.5¢ on full acceptance of the withdrawal offers.

As stated, in reaching the estimates of United's future earning capacity shown in Appendix C, we have applied the dividend rates currently paid on the securities in United's investment portfolio. Hickey, testifying during 1950 at a time when there was a probability of a somewhat higher level of income taxes, stated that he considered the then current dividend rates applicable to United's investment portfolio to be secure in view of the substantial excess of earnings over dividends paid by the companies in which United has its major investments. However, Hickey expressed his inability to appraise the impact of any excess profits tax upon the dividend paying ability of such companies until the actual terms of such tax laws are known.

Since Hickey testified, the dividend rates of a number of the companies in United's portfolio have been raised, federal corporate income tax rates have been increased and an excess profits tax law enacted and further increases in corporate taxes have been proposed. We note, however, that whereas United's prospective income from its investment portfolio as of December 31, 1950, on the basis of current dividend rates totalled about $3,700,000 as shown in Appendix C, its applicable equity in reported earnings for 1950 was about $5,300,000, an excess of earnings over dividends of $1,600,000, or 11¢ per share of United common stock. While 1950 earnings only partially reflect the higher corporate income and excess profits tax rates now in effect, and while further tax increases may be enacted, the fact that dividend rates on stocks in United's portfolio represent payments at an average rate of only 70% of 1950 earnings is significant in considering the security of such dividends. In addition it may be noted that most of the companies in which United has investments were not subject to excess profits taxes in

1950, and of those which were the margin of earnings over dividends were relatively large.

For purposes of analysis in reaching the estimates of United's future earning capacity shown in Appendix C, we have also assumed that the amount of cash to be realized in disposing of securities under the plan would be equal to the market value of such securities as of December 31, 1950, without allowance for cost of sales, and we have applied a rate of 6% to this amount to estimate the return which United would obtain upon reinvestment. The amount of such cash realization and the return which will be earned on its reinvestment are of course matters of conjecture, necessarily involving, as United points out, a program of sales and purchases of large volume extending over a long period. We cannot, however, agree with United's conclusion that the fairness of the plan should be tested on the basis of the situation as it exists at the time of the effectiveness of the withdrawal offers and "not upon a hypothetical situation that might be assumed to exist a year or more in the future." We are of the view that we must not only consider the situation at the time of the withdrawal offers, but we must take into account the probable future impact of the plan on those affected by it.

The Division submitted earnings computations with respect to data as of June 30, 1950, in which it employed the same technique as we have used in Appendix C to estimate the return to be obtained by United upon reinvestment of the cash proceeds of dispositions under the plan. In criticizing the Division's computations, United has questioned the appropriateness of assuming that sales of blocks of securities as large as those to be disposed of under the plan could all be made at the indicated prices as of a given date. United has also argued that because of the commissions, expenses and discounts involved, the assumption of a 6% return on a sum which makes no allowance for such costs would only be justified if investments yielding 6.5% could be made.

Appendix A

Extracts from Findings and Opinion of Commission.

With respect to the amount of cash which will be realized by United in disposing of securities under the plan, we note that in the period from July 1, 1950, to December 31, 1950, United actually disposed of $3,417,000 worth of Columbia common stock, UGI capital stock, and Niagara Mohawk Class A stock at average prices somewhat higher than those of June 30, 1950, which were used by the Division in the computations which United criticized. The market prices as of December 31, 1950, which we have used in our test, are about the same as the comparable prices as of June 30, 1950, employed by the Division. Prices since December 30, 1950, however, have generally been higher than those we have used. In addition, while it is true that in our computations we have made no specific allowance for costs of sales to be made under the plan, it should be noted, in answer to United's specific criticism in this respect, that, excluding the South Jersey common stock on which no dividends are presently being paid, United's present dividend income from the utility securities to be disposed of under the plan represents a return of 6.5% on their market value as of December 31, 1950. And United itself has estimated that its operations as an investment company would produce income about $1,000,000 a year higher than our estimates of its future earning capacity as shown in Appendix C. Additional income of this amount would increase United's earnings per share of common stock about 7¢ to 10¢, depending upon the amount of exchanges effected. However, no testimony in support of this estimated additional income was offered by United, which, as noted, challenged any test of the fairness of the plan based on an estimate of its income as an investment company.

Under all the circumstances, and recognizing that United's earnings as an investment company are highly conjectural, we find that our estimates of United's future earning capacity as shown in Appendix C may appropriately be used in testing the fairness of the plan.

Extracts from Findings and Opinion of Commission.

Future Operations.

United has stated that it contemplates that upon consummation of the plan and subsequent to the entry of an order by us declaring that United has ceased to be a holding company under the Act, it will register under the Investment Company Act of 1940 as a closed-end, nondiversified management company. United has also stated that while it may and expressly reserves the right to engage in the purchase and sale of securities, including Government securities, in the general market, its primary purpose will be to employ its capital in "special situations" as they may arise which in the judgment of the board of directors present favorable opportunities for profitable development. The situations contemplated by United for such investments are specified, without limitation, to be as follows:

(*a*) The financing of reorganizations through loans or the purchase of securities;

(*b*) The acquisition of securities of closely held businesses which may be sold or otherwise disposed of;

(*c*) The purchase of working control in businesses which in the judgment of United's board of directors offer opportunities for development and expansion;

(*d*) The purchase en bloc, and the resale piecemeal, of the assets of companies in liquidation;

(*e*) The acquisition of securities for the purpose of promoting in a lawful manner the merger or consolidation of two or more companies;

(*f*) The participation in new or existing enterprises along with qualified associates.

Hickey testified that the stockholders of United now enjoy a potential tax advantage in that under certain circumstances, and under existing tax laws, dividends paid by United would not be taxable as ordinary income to the recipient. This tax advantage exists because the tax basis

of United's investments, which for the most part is the original cost of such investments determined at 1929 price levels, far exceeds their present market values.[24] Under the present federal income tax statute, to the extent that United realizes net capital losses on the sale of portfolio securities in any taxable year such losses could be offset against its net income so that any distributions to stockholders during that year would to that extent not be taxable as income to them. Instead, such distributions would first be applied tax-free against the cost or other tax basis to the stockholder of his stock until that basis reaches zero, after which they would be taxed as a capital gain. The resultant tax savings to any particular stockholder are dependent not only upon continuation of the present tax laws, which are subject to change, but upon his individual status with respect to income taxes and the tax rates then in effect. In this connection we note that individual tax rates have undergone upward revision since Hickey's testimony was given. Hickey was of the opinion that United could make sales and take tax losses to offset income for a long period of years.

As previously indicated, the sales of portfolio securities required by the plan would produce additional cash ranging from about $17,000,000, if no exchanges are made, to about $770,000, if the exchange offer is completely accepted. The record indicates that the company is preparing to use such cash resources for investments when it is free to embark upon its investment program. With respect to the balance of the investment portfolio of United, Hickey testified that, unless an unusually attractive investment opportunity arose, he would expect United to effect an orderly disposition in order to preserve the maximum tax benefits for its stockholders. Hickey indicated further that, if such an opportunity should arise, these tax benefits could be preserved by obtaining funds

[24] The securities held as of December 31, 1950, had an adjusted tax basis of about $173,000,000, whereas their indicated market value as of that date was $57,638,000.

from other sources, such as bank loans or the sale of United's own securities.

* * * * * * *

United's earnings as shown in Appendix C do not include any part of the excess of earnings over dividends paid by the companies in which United has its investments. We have previously noted that the excess of United's applicable equity in reported earnings for 1950 over dividends received was about 11¢ per share, which would amount to about 64¢ on 5.8 shares of United's common stock.

* * * * * * *

TREATMENT OF OPTION WARRANTS

As noted, United's plan proposes the cancellation of its outstanding option warrants. There are presently outstanding option warrants entitling the holders thereof to purchase 3,732,059 shares of common stock at $27.50 per share at any time without limit. These warrants were issued in 1929 along with shares of preference and common stock incident to the organization of United in exchange for securities of the subsidiary holding companies referred to above.

The Committee for warrant holders urges that the plan be modified to leave the warrants outstanding with their present rights except that the exercise price thereof would be reduced to $19.25, since the assets of United were reduced by about 30% as a result of the special capital dividend of Niagara Hudson common stock paid to United's common stockholders.[43] The Committee further

[43] In our Opinion and Order of October 20, 1949, approving the distribution to the holders of common stock of United, as a special capital dividend, of 1/10th share of common stock of Niagara Hudson for each share of United common stock, we stated that in connection with our consideration of the comprehensive plan under Section 11 (e) we would take into account the effect of the distribution upon the rights, if any, of the option warrant holders, so that any provision made for them would give fair recognition to those rights on the same basis as if the question were being considered prior to the making of the distribution.

contends that, if we do not agree with its position that the exercise price of the warrants should be reduced, we should permit the warrants to remain outstanding with their present rights. Finally, it is argued that if we find that we cannot permit any warrants to remain outstanding, the warrant holders should be accorded compensation for the surrender of their rights in the form of a cash payment or of stock of United equal to the investment value of the warrants, which the Committee variously estimates at from $1.00 to $1.80 per warrant.

Counsel for certain other warrant holders contend that proper recognition of the present rights of the warrant holders requires, as had been proposed in United's plan as originally filed, that the existing warrants be exchanged for new warrants having an exercise price of $7.00 per share and expiring at the end of five years, on the basis of one new warrant for each five old warrants.

In undertaking a consideration of the treatment to be accorded the warrant holders, the special nature of their interest is of major importance. The option warrant confers no right or interest in the present assets and earnings of United; it merely affords a bare right to secure delivery of United common stock upon tender of the subscription price so long as the company remains in existence, with no right to require earnings to be applied to improve the value of the common stock which the holder has the option to purchase.[44]

In valuing warrants in previous cases we have measured the holder's interest on a going-concern basis, treat-

[44] The contingent nature of the warrant holder's interest is emphasized by the language of the warrant certificate, which expressly makes it applicable to the common stock of United "as such stock may be constituted at the time of purchase * * * whether or not the rights or interests represented by such shares are equivalent to the rights or interests represented by the shares of Common Stock of the Company authorized or outstanding at the date hereof or at any other time prior to such purchase and irrespective of any change * * * by way of payment of stock dividends, sale, exchange or other disposition of any class of stock of the Company." The certificate also specifically provides that the warrant "does not entitle the holder * * *, to any rights whatsoever as a stockholder of the Company."

ing it as a present interest in the enterprise which we have described as "a perpetual call upon a portion of the increment in value of the enterprise."[45] But to grant participation to the warrant holders necessarily requires a determination that the possible enhancement in the value of the enterprise, upon which their claim is based, represents something of measurable value, and is not promised on "sheer conjecture" and therefore not ascertainable with any rational degree of certainty.[46] The determination of the value of the warrant holder's interest must be made in terms of projected earnings or asset valuation which would permit us to find that, aside from any value attributable solely to the speculative elements which they have, the warrants have a recognizable present value in terms of a reasonable expectation that the market value of the common stock will in the foreseeable future exceed the exercise price of the warrants.[47]

Hickey testified that after considering the estimated earning power, dividend paying ability, and possible market appreciation of United assets, he came to the conclusion that the maximum value to which United common stock might rise in the reasonably foreseeable future was $10.00 per share with the Niagara Hudson common stock previously distributed considered as still being in its portfolio. Excluding the Niagara Hudson stock, his opinion was that the corresponding figure would be approximately $7.00 per share. Hickey further testified that he could see no intrinsic value for the option warrants in the reasonably foreseeable future, that is, he was unable to visualize an increase in the value of United's assets as great as would be necessary if its stock were ever to be worth the exercise price of the warrants, $27.50 per share.

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[45] *Electric Power and Light Corp.*, S. E. C. (1949), Holding Company Act Release No. 8889.

[46] See *In re Commonwealth & Southern Corp.*, 184 F. 2d 81, 85 (C. A. 3, 1950), Cert. denied 340 U. S. 929 (1951).

[47] See *Niagara Hudson Power Corporation* v. *Leventritt*, 340 U. S. 336, 346-7 (1951).

Wallace, testifying in behalf of United, was also of the opinion that the warrants had no intrinsic value in the sense that United's common stock could be expected to reach a value of $27.50 per share on any recognized basis of valuation.[48]

The minimum price of $27.50 which the common stock would have to attain to make the exercise of the option warrants worthwhile is approximately 130 times the net income applicable to United's present portfolio which we have previously found could be appropriately used in testing the fairness of the plan. If the exercise price were adjusted to $19.25 to reflect the special capital distribution of a portion of United's holdings of Niagara Hudson common stock, it would still represent a value about 90 times such earnings. As indicated in Appendix G attached hereto, since 1931 the market price of the common stock has at no time exceeded $27.50 per share, and has sold no higher than $14.50 and as low as 18¾¢. During the same period, the option warrants have never sold higher than $6.25 and have been as low as four-tenths of 1¢. In 1949, the last year prior to the filing of the instant plan, the prices for the option warrants ranged from a high of 43¾¢ to a low of 12½¢. In 1950, the prices for the option warrants ranged from a high of 31¼¢ to a low of 6¼¢, and the prices in 1951 up to June 1 ranged from a high of 25¢ to a low of 9⅜¢.

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[48] Although it was their opinion that the option warrants had no intrinsic value, both Hickey and Wallace justified the company's original proposal to issue new warrants to the warrant holders in view of the perpetual nature of their rights and the possibility that United as an investment company might have more success than could reasonably be anticipated as a basis of valuation. Under these circumstances, Hickey stated that the company did not feel it could advocate cancellation of the warrants and Wallace felt that it could not be said that the warrants did not have some small value. However, United is also of the view that no present impairment of the interests of its common stockholders which would result from the allocation of cash or stock to warrant holders can be justified, and since it considered that the Division opposed the issuance of warrants even of limited duration, it deemed it advisable to amend its plan to provide for cancellation of the warrants.

[redacted] *Extracts from Findings and Opinion of Commission.*

The Committee for warrant holders argues that there is a very reasonable possibility that within a period of twelve to fifteen years the common stock of United will have a market value of $25.00 per share, and that, if there had been no distribution of the Niagara Hudson stock, it would in that period have had a market value of $32.50 per share.

Charles Tatham, a security analyst and member of the Committee, testified that in his opinion the past, present, and prospective net asset value and market price per share of common stock of an investment company give a more accurate basis for computing its present and prospective value than does its net earnings per share. The record contains various exhibits submitted by Tatham in support of his contention. Tatham testified that of ten selected closed-end management investment companies, as set forth in an exhibit, the percentage appreciation in net assets per share of common stock from the end of 1937 to the end of 1949 varied from a low of 63% to a high of 1465%. In four of the cases the increase was over 350%. The same exhibit shows that the percentage of appreciation from the lowest year-end figure to the highest year-end figure varied from a low of 182% to 11,220%. Tatham was of the opinion that these companies are as comparable to the type of concern which United proposes to become as can be found.

Another exhibit prepared by Tatham gives the price range of the common stock of what he considered to be the leading closed-end management investment companies from 1938 to 1946 and again in 1949. It gives the 1949 high as a percentage of the 1938-46 low. In no case was the percentage increase less than 163. In thirteen of the thirty-two companies the percentage was over 1,000 or an increase in the market price of their common stocks of over ten times. The Committee urges that there is no reason to believe that United's common stock may not have a similar increase in the next twelve years.

Appendix A

Extracts from Findings and Opinion of Commission.

The Committee further urges that even on the basis of annual net income per share there seems to be every reasonable likelihood that the common stock of United will come to be worth at least $25.00 per share or $32.50 per share if the distributed Niagara Hudson stock is taken into account. The exhibits of the Committee indicate that the highest income of eight of the leading closed-end management investment companies was over ten times the lowest income per share during the period of 1937 to 1949, and in no case was the highest income less than 125% of the lowest income. The Committee is of the opinion that over the next twelve-year period United's earnings will accomplish similar results and therefore the market value of United's common stock is bound to increase just as the market value of the common stock of other investment companies has increased.

Tatham was of the opinion that the market value of United's investments was substantially less than their fair investment value and that on June 30, 1950, United's investment portfolio had a fair investment value of at least 20% to 25% more than its then current market value. He, accordingly, adjusted upward the net asset value as of that date of about $4.20 per share of United's common stock and arrived at a fair investment value of the common stock at that time of from $5.00 to $5.25 per share. In his view the warrants had a fair investment value of from 20% to 25% of the fair investment value and market value, respectively, of the common stock, and he concluded that the fair investment value of the warrants was about $1.00 to $1.25 per warrant. He further testified that, had the special capital distribution of Niagara Hudson common stock at the end of 1949 not been made, the fair investment value of the warrants would have been from $1.60 to $1.80 per warrant.

It is apparent that Tatham's entire testimony is based on the assumption that in the next twelve to fifteen years the course of United's progress will parallel that of the

other leading investment companies during the period 1937 to 1949 and that the same appreciation will occur that occurred during that period. We are not persuaded, however, that these statistics can be relied on as showing that United's common stock will in the foreseeable future increase in value to the extent necessary to give the warrants a recognizable present value.

Hickey, who on this record has stressed the advantages to stockholders of having United transformed into an investment company, testified that the most optimistic value he could anticipate for the common stock of United within the reasonably foreseeable future, after allowance for the special capital distribution of Niagara Hudson common stock at the end of 1949, was $7.00 per share. To attain this amount United's net assets would have to appreciate to about $100,000,000 or approximately 66% over their present value of $60,000,000. To attain a value equivalent to the exercise price of the warrants if it were adjusted to $19.25, as suggested by the Committee to reflect the special capital distribution of Niagara Hudson common stock, United's assets would have to appreciate to $280,000,000 or approximately 365% over the present $60,000,000. And to attain a value equivalent to the unadjusted price of the warrants of $27.50 per share United's assets would have to appreciate to about $400,000,000 or approximately 565% over the present $60,000,000. Hickey also testified that United's management believed that as an investment company United should pay out in dividends a very large proportion of its earnings and profits, so that there would be relatively little improvement in the asset value of its stock as the result of the retention of earnings. Moreover, we note that the warrant contract expressly reserves to the company the right to capitalize any retained earnings through the declaration of stock dividends in which the warrant holder has no interest.

Appendix A

Extracts from Findings and Opinion of Commission.

Because of the limitations of human foresight, we are not required to indulge in the conjecture that the warrants might be valuable for reasons not now foreseeable, and on the basis of that conjecture accord the warrant holders something of a present ascertainable value at the expense of the common stockholders. The fair and equitable standard of Section 11 (e) does not require that such considerations be given any recognition in the determination of investment value for purposes of participation in the reorganization.[49] The considerations upon which the Committee asserts a value for the warrants "reflect merely vague hopes or possibilities," and valueless junior interests cannot be permitted "to perpetuate their position in an enterprise on such ephemeral grounds." *Cf. Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, 123 (1939).

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[49] In support of its contention that the warrants should not be cancelled without consideration, the Committee has pointed to decisions of this Commission according participation in reorganizations under Section 11 to holders of common stock which was subject to large preferred stock arrearages that could not be expected to be eliminated out of earnings for many years in the future. However, in those cases the earnings history and outlook of the utility enterprise supplied a sufficient basis to enable us to estimate the prospects for satisfaction of the arrearages and acquisition by the common stockholders of a present interest in earnings and dividends. In the case of the United warrants the record does not contain any basis sufficient to predicate a finding of future value for them. Moreover, the warrant holder has a contingent position which is distinctly inferior to that of a common stockholder whose interest in earnings is deferred because of the existence of preferred stock arrearages. The latter can direct the application of earnings to the reduction of the preferred stockholders' prior claim with a consequent improvement of his own equity and shortening of the time when he will have a present interest in earnings and dividends. A holder of United warrants, on the other hand, as has been indicated, has no right to require United to retain earnings to improve the value of its common stock, nor can he anticipate such retention to any significant degree under United's proposed plan of operations. In our view cancellation of the warrants is in no way inconsistent with the common stock allocations we have approved in the cases cited by the Committee.

Appendix A

Extracts from Findings and Opinion of Commission.

Under all the circumstances we cannot find that there is a reasonable expectation that United's earnings and assets over the foreseeable future will be such that the market price of its common stock will increase to the extent needed to give the warrants a recognizable value. The recent high market price of $4\frac{3}{4}$ would have to increase about 5.8 times to reach an exercise price for the warrants of $27.50, and about 4 times to reach an exercise price of $19.25. We conclude that the holders of such warrants are not entitled, under the standards of fairness and equity, to any participation in the reorganization of United. We further find that the continuance of the option warrants, representing as they do such an extremely tenuous right, would be inherently deceptive to investors and perpetuate in the corporate structure useless and unnecessary complexities, in contravention of the requirements of Section 11 (b) (2).[50] Accordingly, elimination of the option warrants as proposed by the plan is appropriate under the standards of the Act.

* * * * * * *

Phillips also proposes that we require a reorganization of United's board of directors so as to include at least one representative of opposition stockholders for every two of management stockholders, and that we disapprove any management for United which includes Hickey as president and director, and John L. Burns, Richard Joyce Smith, and Clarence Southerland as directors or counsel. These proposals apparently stem from Phillips' contention that Hickey and other management representatives conducted United's 1947 stockholders' meeting improperly, and illegally recessed it on the alleged ground that no quorum was present in order to gain time to secure a favorable vote. We have fully considered

[50] *Commonwealth & Southern Corporation*, S. E. C. (1945), Holding Company Act Release No. 5825.

Appendix A

Phillips' contention in these respects and have concluded that the vote taken in 1947 is no longer relevant to the determination of the issues on the plan now before us in view of the inclusion in United's plan of the provision for withdrawal by stockholders not favoring United's proposed change in operations which we have found to be fair and equitable if appropriately modified. At this point the controversy pressed by Phillips with respect to the propriety of United's management at the 1947 meeting and subsequent thereto can be considered relevant at most only to the question of the integrity of United's management and its qualification to continue as representatives of stockholders. We do not think we should, under the circumstances, undertake to interfere on such a question with the normal processes of corporate elections and in effect substitute our judgment for that of United's stockholders, with whom the choice of directors properly resides. United has a single class of stock and there is no inequitable distribution of voting power. Through the proxy solicitation machinery available within the ambit of our rules, stockholders desiring to oppose the management may communicate their views to the other stockholders and the management may reply thereto. Such material will serve as a guide to the stockholders in expressing their independent judgment in choosing the directors.

* * * * * * *

By the Commission (Chairman McDonald, Vice Chairman Cook, and Commissioners McEntire and Rowen).

ORVAL L. DUBOIS,
Secretary.

[SEAL]

June 15, 1951.

THE UNITED CO

Estimated Earning Capacity Based on Holdings as of
and as Adjusted to Show the Effe
Assuming Acceptance to the Sam

Income From Securities	Dividend Rate	Estimated Income and Expenses	(A) No Ac Adjustments
Niagara Mohawk			
Class A	$1.20	$ 50,980	$ (50,980)
Common	1.40	1,501,963	(861,000)
Columbia Common	.80	651,309	(71,221)
Public Service Common	1.60	649,806	—
Consolidated Edison Co. Common	2.00	409,360	—
UGI Capital	1.40	127,165	(19,712)
South Jersey Common	—	—	—
West Penn Electric Common	2.00	129,744	—
Cincinnati Gas & Elec. Common	1.80	31,246	—
Southern Company Common	.80	35,252	—
American Water Works Common	.60	28,122	—
Ohio Edison Common	2.00	25,376	—
Cons. Gas, Elec. Lt. & Pwr. Balto Common	1.40	19,257	—
Lehigh Coal & Navigation Capital	.80	38,964	—
Philadelphia Elec. Common	1.50	5,501	—
Total Income from Securities		$ 3,704,045	$(1,002,913)
Assumed 6% return on net cash increases		—	1,036,526
Total Income		$ 3,704,045	$ 33,613
Income Charges			
Estimated Expenses[a]		$ 415,000	$ —
Estimated Federal Income Tax[b]		231,878	2,370
Total Income Charges		$ 646,878	$ 2,370
Net Income		$ 3,057,167	$ 31,243
No. of Shares Outstanding		14,529,492	
Total Income Per Share		25.5¢	
Net Income Per Share		21.0¢	

[a] As estimated by United on approximately the same assumptions with respect to e

[b] Estimated at currently effective tax rate of 7.05% on net income before Federal

THE UNITED CORPORATION

d Earning Capacity Based on Holdings as of December 31, 1950 and Current Dividend Rates and as Adjusted to Show the Effect of the Withdrawal Offers Assuming Acceptance to the Same Extents as in Appendix A

Dividend Rate	Estimated Income and Expenses	As Adjusted to Reflect the Consummation of the Plan, Assuming (A) No Acceptance		(B) Partial Acceptance (Approximate Maximum Estimated by United)		(C) Full Acceptance	
		Adjustments	Adjusted	Additional Adjustments	Adjusted	Additional Adjustments	Adjusted
$1.20	$ 50,980	$ (50,980)	$ —	$ —	$ —	$ —	$ —
1.40	1,501,963	(861,000)	640,963	—	640,963	(119,000)	521,963
.80	651,309	(71,221)	580,088	—	580,088	—	580,088
1.60	649,806	—	649,806	—	649,806	—	649,806
2.00	409,360	—	409,360	—	409,360	—	409,360
1.40	127,165	(19,712)	107,453	—	107,453	—	107,453
—	—	—	—	—	—	—	—
2.00	129,744	—	129,744	—	129,744	—	129,744
1.80	31,246	—	31,246	—	31,246	—	31,246
.80	35,252	—	35,252	—	35,252	—	35,252
.60	28,122	—	28,122	—	28,122	—	28,122
2.00	25,376	—	25,376	—	25,376	—	25,376
1.40	19,257	—	19,257	—	19,257	—	19,257
.80	38,964	—	38,964	—	38,964	—	38,964
1.50	5,501	—	5,501	—	5,501	—	5,501
	$ 3,704,045	$(1,002,913)	$ 2,701,132	$ —	$ 2,701,132	$(119,000)	$2,582,132
	—	1,036,526	1,036,526	(391,716)	644,810	(598,626)	46,184
	$ 3,704,045	$ 33,613	$ 3,737,658	$(391,716)	$ 3,345,942	$(717,626)	$2,628,316
	$ 415,000	$ —	$ 415,000	$ (45,300)	$ 369,700	$ (43,800)	$ 325,900
	231,878	2,370	234,248	(24,423)	209,825	(47,505)	162,320
	$ 646,878	$ 2,370	$ 649,248	$ (69,723)	$ 579,525	$ (91,305)	$ 488,220
	$ 3,057,167	$ 31,243	$ 3,088,410	$(321,993)	$ 2,766,417	$(626,321)	$2,140,096
	14,529,492		14,529,492		12,744,492		9,531,492
	25.5¢		25.7¢		26.3¢		27.0¢
	21.0¢		21.3¢		21.7¢		22.5¢

ately the same assumptions with respect to exercise of the withdrawal offers as are made in this Appendix.

rate of 7.05% on net income before Federal income taxes.

THE UNITED CORPORATION

Common Stock and Option Warrants

Price Range and Volume of Trading 1929-1951

Year	Common Stock			Option Warrants		
	High	Low	Volume of Trading (a)	High	Low	Volume of Trading (b)
1929	75½	19	14,259	47⅞	8½	1,162
1930	52	13¾	18,366	30⅞	6	341
1931	31¼	7½	15,419	15¼	2¾	303
1932	14	3½	5,388	6	1¼	111
1933	14½	4	8,056	6¼	1¼	145
1934	8⅞	2⅛	2,777	2⅞	½	109
1935	7⅛	1½	4,107	1¾	⅜	135
1936	9¼	5⅝	5,047	2¾	1¼	207
1937	8½	2	2,959	2	½	122
1938	4⅜	2	1,963	⅞	¼	89
1939	3¾	2	1,461	9/16	¼	49
1940	2⅞	1¼	1,381	⅜	1/16	94
1941	1½	3/16	1,876	3/16	1/256	181
1942	7/16	7/32	857	5/32	1/64	22
1943	2¼	11/32	2,928	5/16	1/16	1,635
1944	1⅞	1⅛	1,815	⅛	1/32	375
1945	5	1¼	5,085	1¼	3/64	1,672
1946	7⅛	3¼	4,937	2½	⅛	1,940
1947	4⅜	2⅜	1,980	15/16	⅛	557
1948	3⅞	2⅛	2,131	⅞	3/16	855
1949	5	2¼	3,982	7/16	1/4	905
1950	4¼	3⅜	3,581	5/16	1/16	1,212
1951(c)	4¾	4	1,108	¼	3/32	462

(a) In thousands of shares on the New York Stock Exchange.

(b) In thousands of warrants (with each right to purchase one share of United Corporation common stock considered as one warrant) on the New York Curb Exchange.

(c) Through June 1, 1951.

OPINION OF DISTRICT COURT.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

In the Matter of THE UNITED CORPORATION	}	Civil Action No. 1650

SUR APPLICATION OF THE SEC FOR APPROVAL AND ENFORCEMENT OF A VOLUNTARY PLAN UNDER § 11(e) OF THE PUBLIC UTILITY HOLDING COMPANY ACT.

At Wilmington,
January 17, 1955.

LEAHY, *Chief Judge.*

This is a suit by the Securities and Exchange Commission for approval and enforcement of a voluntary plan filed by the United Corporation under § 11(e) of the Public Utility Holding Company Act of 1935, 15 U. S. C. §§ 79 *et seq.*, and approved by the SEC in 1951 which, among other things, cancels all United's outstanding warrants to purchase 3,732,059 shares of its own common stock with no compensation to the warrant holders. United's transformation into a registered investment company will also be discussed. The Plan, as amended, was approved by order of the SEC on June 26, 1951. The only provisions of the Plan before the court for enforcement and approval are those requiring cancellation of the outstanding option warrants to purchase common stock of United, and amending United's charter and by-laws so as to permit cumulative voting and to increase the quorum at stockholders' meetings from 25% to 50% of the outstanding stock. Hearings on the Plan before the SEC took eight months. The transcript comprised 4,595 pages together with voluminous exhibits. The whole record has been introduced here.

On June 15, 1951, the SEC filed its Opinion and Findings approving the Plan, subject to certain suggested modifications. After United filed appropriate amendments, the SEC's order of final approval was entered on June 26, 1951.

The proceedings began with the filing of a voluntary plan with the SEC on November 6, 1949, by United under § 11(e). On August 14, 1943, the SEC had directed United to cease being a holding company and to change its capital structure to one class of stock.[1] At that time United had outstanding preference stock, common stock and warrants. United, with approval, had by November 15, 1949, retired its preference stock and disposed of all but two of its former subsidiaries. The next day United filed a plan which provided it would cease to be a holding company but would continue as an investment company. The plan provided for new 5-year warrants to purchase common stock at $7 per share, and to be issued in exchange for outstanding warrants at the rate of 1 new warrant for each 5 old ones. On June 13, 1950, United filed an amendment to the plan[2] which provided for the cancellation of all outstanding warrants without compensation to the holders. This was at the suggestion of the staff of the SEC and apparently at this time United did not take the position such a step was necesary or fair.

In July 1950, the General Protective Committee for the holders of option warrants was formed. It appeared before the hearings of the SEC on the forfeiture of the warrants, claimed the action unfair and unnecessary and introduced its evidence to that effect.

The SEC found presence of the warrants in United's structure constituted a corporate complexity which had to be eliminated under § 11(b)(2) and cancellation of the

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[1] The United Corporation, 13 S. E. C. 854, 877, 899.

[2] The Plan filed November 16, 1949, as amended on June 13, 1950, is referred to here as the "Plan".

warrants would complete simplification of United's corporate structure. The SEC noted the right to buy common stock at $27.50 a share applies to the common stock "as such stock may be constituted at the time of purchase * * * irrespective of every change * * * by way of payment of stock dividends, sale, exchange or other distribution of any class of stock of the Company." The SEC discussed standards of valuation approved by the courts[3] and the expert opinion evidence submitted before the Commission both by United and the Committee for the option warrant holders. Assets and earnings of United's portfolio securities and the market history of United's common stock were considered. The Committee's documentary proofs showing changes in net assets and in common stock market prices of closed-end management investment companies, were reviewed. The SEC stated it was unable to find any reasonable expectation United's earnings and assets in the foreseeable future would be such its common stock would increase so as to give the warrants a value whether the option price were to remain at $27.50 or be reduced to $19.25 per share.[4] The SEC concluded the warrant holders "are not entitled, under the standards of fairness and equity, to any participation in the reorganization of United"; the continuance of the warrants "representing as they do such an extremely tenuous right, would be inherently deceptive to investors and perpetuate in the corporate structure useless and unnecessary complexities, in contravention of the requirements of Section 11(b)(2)"; and "elimination of the option warrants as proposed by the plan is appropriate under the standards of the Act." The SEC's approval of the cancellation of option warrants (and of the proposed amendments to the charter and by-laws) was conditional,

[3] Niagara Hudson Power Corp. v. Leventritt, 340 U. S. 336, reversing S. E. C. v. Leventritt, 2 Cir., 179 F. 2d 615; *In re* Commonwealth & Southern Corp., 3 Cir., 184 F. 2d 81, affirming D. C. Del., 84 F. Supp. 809, cert. den., 340 U. S. 929.

[4] The price difference will be discussed *infra*.

pursuant to United's request, upon an order of approval and enforcement by an appropriate District Court.

On August 23, 1951, before any application to a District Court for enforcement had been made, Randolph Phillips, *et al.*, stockholders of United, appealed under § 24(a) to the Court of Appeals for the District of Columbia from the SEC's order approving the Plan. On March 31, 1953, the Court affirmed the SEC's order,[5] and on January 4, 1954, it was reversed in part by the Supreme Court,[6] which held: the Court of Appeals had jurisdiction to review the order of the Commission approving so much of the Plan as did not call for enforcement by a District Court, *i. e.*, United's continuance as an investment company. It denied a petition by Phillips for certiorari to this portion of the decision;[7] but decided the Court of Appeals had no jurisdiction to review the Commission approval of those parts of the Plan—cancellation of warrants—which required District Court enforcement.

Phillips who had participated in the proceedings before the SEC, was a party in the § 24(a) appeal, took a position before the Court of Appeals it had jurisdiction to review all aspects of the Plan including all those which the SEC had expressly made subject to review only by the enforcement District Court.

The Committee had been permitted to intervene in the review proceedings before the Court of Appeals over the objections of the SEC and United and was heard in opposition to the proposed cancellation of the warrants. The Court of Appeals affirmed on the merits the opinion of the SEC and held "the findings of the Commission with respect to the warrants are supported by evidence which we regard as substantial."[8] After referring to Niagara Hudson Power Corp. *v.* Leventritt, *supra*, Judge

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5 Downing *v.* S. E. C., C. A. D. C., 203 F. 2d 611.

6 General Protective Committee *v.* S. E. C., 346 U. S. 521.

7 346 U. S. 930.

8 Downing *v.* S.E.C., D. C. C. A., 203 F. 2d 611, 624.

Wilbur K. Miller wrote: "We see no reason to disturb the Commission's findings that the plan of compliance submitted by United, including the provision for eliminating option warrants, is necessary to effectuate the purpose of § 11(b), and is fair and equitable to the persons affected thereby. Having so found, the Commission was under a statutory duty to approve the plan." The Court of Appeals held it had jurisdiction to review the provisions of the Plan which the SEC had made subject to District Court review and enforcement. It thought those provisions, however, should be submitted to a District Court for the purpose of enforcement only but stated, further, the SEC's findings on these matters were supported by substantial evidence within the SEC's administrative discretion.[9] In the meantime, on July 15, 1952, United with SEC approval had sold all its stock in its last subsidiary, South Jersey Gas Company.[10] Since then it has not owned 10% of the voting securities of any public utility company and has not been a holding company or a part of any such system.

During the § 24(a) review proceedings before the Court of Appeals, the Committee moved twice for leave to adduce additional evidence by way of testimony. That Court granted leave to file the motions but denied leave to adduce additional evidence. The second motion for such leave was filed after United's sale of the South Jersey Gas Corporation stock and on the ground United was no longer a part of a holding company system. This motion was denied in part. On the Committee's petition for rehearing, based on the alleged loss of jurisdiction, it was denied by the Court of Appeals on April 22, 1953. Re-

[9] *Id.*, 620.

[10] The SEC, before it would approve the sale, required United to stipulate it would not in the future by reason of the sale challenge the jurisdiction of the Commission with respect to "whatever action may be necessary to completely effectuate the purpose of Section 11(b) of the Act." The United Corporation, HCAR 349, June 24, 1952, p. 6.

Warrant holders were not parties to the stipulation and would appear not bound by it.

versing position, the Committee then petitioned the Supreme Court for certiorari to review the Court of Appeals decision it had jurisdiction to pass upon the merits of the SEC's holding the option warrants should be cancelled. In short, the Committee adopted the position taken by the SEC and United (reaffirmed by them on the pending application for certiorari) that the Court of Appeals was without jurisdiction to review the merits of the provisions of the Plan requiring District Court enforcement. It would appear the Supreme Court held the Court of Appeals had jurisdiction under § 24(a) to review all questions tendered to it, except those relating to cancellation of option warrants and the proposed amendments to the charter and by-laws of United.[11]

The Supreme Court accepted the so-called "split review" procedure; *i. e.*, review of certain provisions of the Plan by the Court of Appeals and review and enforcement in a District Court of the provisions as to cancellation of the option warrants and with respect to the change in the charter and by-laws.[12] The Supreme Court reversed the Court of Appeals in "taking jurisdiction over the provisions of the voluntary place of reorganization which the Commission in its order made operative on enforcement by the District Court."[13]

On March 1, 1954, the Court of Appeals amended its former judgment and dismissed the petition for review for lack of jurisdiction so far as the SEC's order related to provisions of the Plan operative only on enforcement by a District Court. Then the Committee applied to the SEC to reopen the hearings to adduce additional evidence. Diamond, *et al.*, holders of option warrants, supported the application. The SEC entered a Memorandum Opinion and Order denying the application and found the arguments of the warrant holders were the same as those

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11 General Protective Committee v. S.E.C., 346 U. S. 521, 529.

12 *Id.*, 529.

13 *Id.*, 536.

presented by the Committee in 1951. The SEC found the record included data as to closed-end investment companies covering 1937-49 similar to that offered by the Committee; the increases since 1949 with respect to closed-end companies offered by the Committee and those since 1951 with respect to United were not of a nature to require reconsideration; the Committee's profert of additional opinion evidence was not sufficient to justify reopening the record; the steps taken by United in compliance with the Act had not affected the power to require or the appropriateness of eliminating from United's capital structure the option warrants.

The SEC then filed its application here for enforcement. Both the Committee and Diamond, *et al.*, object to the cancellation of the option warrants. Phillips, *et al.*, likewise raised their several other objections which are discussed *infra*. Motions to reopen the record were renewed in this court. At the hearing the Committee sought disapproval of the Plan and asked that the option warrants remain outstanding[14] and to remand the case to the SEC to consider a possible reduction in exercise price of the warrants from $27.50 to $19.25 a share of United's common stock.[15] Diamond asked for the case to be returned to the SEC for further proceedings to fix a value for the warrants.[16]. The SEC, United and Phillips, *et al.*, argued approval of the provisions of the Plan for cancellation of the option warrants as undue complexity having no present value or any in the foreseeable future.

United Supports the Application of the SEC.

United claims the findings of the SEC on elimination of the option warrants are supported by substantial evidence and are in accordance with legal standards. United rests its case on these elements:

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[14] District Court Record 1.
[15] R. 85-6.
[16] R. 103.

1. William M. Hickey, President of United and a recognized investment analyst, testified there was no possibility in the foreseeable future of United's common stock reaching $27.50 per share, the exercise price of the warrants. Alan W. Wallace, Vice-President of Moody's Investor's Service, after an independent study, corroborated Hickey.

2. The testimony of these two experts was limited by the expert opinion of Charles Tatham, Jr., which consisted of statistical comparisons of securities of other companies. Tatham's views were attacked by United because based on conjecture and speculative assumptions, and because the SEC's determinations are supported by a record which shows careful consideration given by the Commission to the status of the option warrants and their lack of any intrinsic value.

3. The SEC's decision the warrants should be cancelled was arrived at, United argues, in accordance with legal standards announced in Niagara Hudson Power Corp. *v.* Leventritt, 340 U. S. 336; In re Commonwealth & Southern Corporation, 3 Cir., 184 F. 2d 81, cert. den., 340 U. S. 929; and in the language of the Supreme Court in Securities and Exchange Commission *v.* Central-Illinois Corp., 338 U. S. 96, this determination of the SEC was "made in an area in which Congress had delegated" such decisions and may not be disturbed.

DIAMOND, ET AL., BIDDLE AND THE GENERAL PROTECTIVE COMMITTEE FOR OPTION WARRANT HOLDERS OPPOSE THE APPLICATION OF THE SEC.

Diamond, *et al.*, Biddle and the Committee argue the Plan provided United cease to be a holding company and the inclusion therefor of a provision forfeiting the option warrants was unauthorized and unenforceable. These objectors' first two attacks are these:

I.

1. Requirements of § 11 are each holding company must (i) confine its operations to a single public utility system, (ii) not have an unfair distribution of voting power, and (iii) not have unnecessary complications to its capital structure. Since the purpose of the Act was to regulate holding companies, a company can effect compliance with § 11 in either of two ways: (*a*) it may effect internal reforms with respect to integration of properties, voting power, and undue system complications, necessary to bring its system into compliance with prescribed statutory standards, so it may continue as a holding company subject to the regulation provided in the Act for such companies; or (*b*) it may reduce its security holdings of public utility operating companies to less than 10% and cease to be a holding company and thus put itself outside the field subject to regulation by the Act. In short, these objectors argue any holding company can effect compliance with § 11 by ceasing to be a holding company and thereafter cease to be subject to § 11; or, as pointed out by the Supreme Court in reviewing the Plan *sub judice:*

> "The Congress contemplated that under this Act some holding companies might satisfy the requirements of § 11 by divesting themselves of control and converting themselves into investment companies."[17]

2. If compliance is had under the Act by a subject ceasing to be a holding company, then the objectors argue once such a company elects with SEC approval to adopt this method of compliance there is nothing in the Act which authorizes a plan to rearrange rights of security holders, and cancel an entire class of securities without the consent of such holders. In short, if a provision in any plan is not authorized by the Act, the SEC has no power to require it to be filed or to approve it or to request a District Court to enforce it.

[17] General Protective Committee v. S.E.C., 346 U. S. 521, 530.

3. This is for the reason in the case of holding companies who were to keep their corporate identity, Congress determined by the Act the public interest required the overriding of contract rights of security holders; but, there is nothing in the Act to indicate any intent to affect contract rights in cases where the subject has surrendered its right to be a holding company. From this, objectors point out in such case the regulation of corporate structures is exclusively for state law and the SEC was never given mandate by the Act to override the corporation laws of the several states except in the case of companies which continue as interstate holding companies. Applicability of these principles to the present facts makes it clear that in 1943 United, with SEC approval, decided to comply with the Act by ceasing to be a holding company. The plan filed November 16, 1949, provided this would be done. The last required step was on July 15, 1952, when United disposed of its last subsidiary and ceased to be a holding company.

The contention is there is no public policy which requires regulation of a former holding company which is now an investment company, to cancel without compensation warrants issued and acquired in good faith and for value 25 years ago and which have been outstanding and widely traded in on the New York Curb Exchange with the approval of the SEC.[18] So, it is argued, United

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[18] This appears to be the first case where a plan provides a holding company shall cease to exist with the question presented whether it is also necessary for it in addition to comply with other provisions of §11 of the Act. The problem has not reached any court probably because it was not until the Supreme Court passed on United's Plan in this case on January 4, 1954, that any court had said a holding company could satisfy the requirements of §11(b) of the Act by disposing of its subsidiaries and converting itself into an investment company.

The SEC has dealt with the question on the administrative level in several cases:

a. Standard Oil Company (N. J.), 10 S.E.C. 1122, 14 S.E.C. 342, 15 S.E.C. 373. The plan provided, filed under §11(e), Standard would dispose of its securities of public utility subsidiaries by distribution of their stock to its own shareholders thus making it no longer a holding company. It was

had no right to file with the SEC a plan cancelling the warants, for such destruction of contract rights is not sanctioned by the Act, should never have been approved by the SEC and should not be approved by the enforcement court.

II.

4. Moreover, these objectors claim cancellation of the warrants is not necessary as they do not create the kind of complexity which the Act seeks to remove. The question is whether at the present time or in 1951 (when the SEC approved the Plan) the warrants unnecessarily or unduly complicated the holding company system structure. In other instances necessary findings under §11 proceedings have been made as at the present time. Standard Gas & Electric Co., D. C. Del., 63 F. Supp. 876; *In re* Interstate Power Co., D. C. Del., 89 F. Supp. 68. The selection of dates may be critical because since July 15, 1952, United is no longer a part of a holding company system. The matter under any view shows little difference, for in 1950 United simply had common stock and warrants outstanding. It had no other stock, bank loans, or funded debt. At that time it had only two direct subsidiaries, Niagara Mohawk Power Corporation and South Jersey Gas Company, both of which have been disposed of. Warrant holders make a strong argument

never proposed or required to redistribute its voting power or simplify its system structure as it would have been required by §(b)(2) if it had remained a holding company.

b. Public Service Corporation of New Jersey, 27 S.E.C. 682 (enforced D. C. N. J., 1948). Plan under §11(e) provided for elimination of a public utility operating company without such compliance with the integration provisions of §11(b)(1) as would have been necessary if the operating company had remained a part of the holding company system.

United Gas Improvement Co., HCAR 11, 495 (1952), p. 9. Same as Public Service case, *supra*, the SEC saying: "* * * If the Plan is approved and consummated, UGI will consist of a single operating company and there will remain no holding company system. Accordingly, the effect of the merger will make it unnecessary to apply the literal standards of Section 11(b)(1) to the new merged company."

their securities do not constitute a complication within the rules laid down in the cases,[19] for in the instant case unlike other cases United is not to remain a public utility, whose earnings are usually limited to a fixed, conservative rate of return. Such considerations are not applicable to an investment company. From the findings of the SEC and the statements of counsel at oral argument, the emphasis was not that the outstanding warrants would complicate the internal structure of United but the cancellation was in the interest of possible future purchasers; and the existence of warrants should be terminated because they are an undesirable kind of security of uncertain value. But the warrant holders argue there is no statutory authority to cancel their class of securities under the special circumstances of the instant case. As stated, these arguments have force. It is difficult to see how the warrants complicate the former holding company system of United or that forfeiture is "necessary" or "appropriate" to effectuate the provisions of § 11(b).

[19] "The question involved in the present order is merely whether, in the light of the capital structure of Commonwealth's system, the continuance of any preferred stock will so burden and complicate the system in connection with its future financing and other operations as to run afoul of the standards of simplicity which Section 11(b)(2) has set." Commonwealth & Southern Corp. *v.* S.E.C., 3 Cir., 134 F. 2d 747, 754.

"Complexity is not a matter to be determined merely by counting the classes of securities outstanding. A corporate structure is unduly and unnecessarily complicated when it prevents the corporation involved from performing its functions." *In re* Community Power & Light Co., S. D. N. Y., 33 F. Supp. 901, 914.

"When earnings and assets of subsidiaries are not sufficient to provide for any of the stock of a holding company the considerable degree of security which the public attributes to preferred stock, it may reasonably be thought that the division of the holding company's stock into preferred and common will 'unduly or unnecessarily complicate the structure' of the system." Central & Southwest Utilities Co., *v.* S.E.C., 136 F. 2d 273, 275, 78 App. D. C. 37, 39.

"'The Commission was free to eliminate such securities as these [perpetual warrants to buy common stock], constituting as they did a perpetual right to demand an increase in the common shares of the new company. Such a possible future increase in the capital of a *public utility company* might well be deemed, certainly a needless, and perhaps a disturbing, 'complexity' in its 'structure'." S.E.C. *v.* Leventritt, 2 Cir., 179 F. 2d 615, reversed on other grounds, 340 U. S. 336. (Emphasis added.)

5. It is claimed the warrants have an investment value and their forfeiture is not fair and equitable to the holders under § 11(e) of the Act. Objectors argue United has failed to meet the burden of proof such forfeiture is "fair and equitable" and the findings of the SEC are not supported by evidence that the forfeiture is fair and equitable to the warrant holders. The Committee claims if the warrants have a present investment value, no plan requiring cancellation could be fair. Niagara Hudson Power Corp. *v.* Leventritt, 340 U. S. 336.[20] The concept "foreseeable future" is elastic enough to mean from 15 to 50 years.[21] The record indicates during the course of the administrative proceedings United was willing—believed it fair—to permit the warrants to remain

[20] At p. 344:

"If there is ground for a reasonable expectation that [the market value of the common stock and the exercise price of the warrants] *may* coincide within the foreseeable future, then the warrants would have an intrinsic and investment value directly related to the common stock. Under those circumstances, we assume no plan of reorganization would be fair or equitable within the meaning of §11(e) of the Act that did not recognize that value and provide an equitable equivalent for it." (Emphasis added.)

[21] For example, see:

Southern Colorado Power Co., 14 S.E.C. 115, 146 (1943), enforced D. Colo. (1944), aff'd sub nom. Disman *v.* S.E.C., 10 Cir. (1945), 147 F. 2d 679, cert. den. 325 U. S. 863 (1945). —*95 years*

The North American Co., HCAR 11,390, p. 12 (1952), enforced D. Md. (1952). —*58 to 74 years*

The Middle West Corp., 27 S.E.C. 195, 231-2 (1947), enforced sub nom. *In re* North West Utilities Co., D. C. Del. (1948), 76 F. Supp. 63. —*23 years*

The United Light and Power Co., 13 S.E.C. 1, 17 (1943), enforced D. C. Del. (1943), 51 F. Supp. 217, 222, aff'd sub nom. *In re* Securities and Exchange Commission, 3 Cir. (1944), 142 F. 2d 411, 417, 420-1, aff'd sub nom. Otis & Co. *v. S.E.C.*, 323 U. S. 624, 632, rehearing den., 324 U. S. 887 (1945). —*15 years*

The exercise price specified in the warrants is $27.50 per share. But, this must be reduced to $19.25 per share by reason of the substantial capital distribution made by United to its stockholders in 1949. The warrants were originally issued in 1929 for $27.50. In 1949, under compulsion of §11, United made a capital distribution to its stockholders of stock of Niagara Hudson Power Corp., the correct value of which was equal to about 30% of the market value of all assets of United. Fairness to warrant holders requires the original exercise price of $27.50 be reduced by 30% thereof, or $8.25, to $19.25 per share.

outstanding and the original plan for the issue of new short-term warrants in lieu of the outstanding warrants, was because of the belief of United that the staff of the Commission opposed the continued existence of the old warrants at their exercise price. Thereafter, United amended the Plan providing for complete cancellation of the warrants. In fact, it is stipulated of record the only reason United filed its amendment calling for cancellation was because it believed any provision for warrants in the Plan would be opposed by the staff of the SEC, and United did not desire to litigate this question. The basic findings on fairness of the cancellation of the warrants made by the SEC were:

"The determination of the value of the warrant holder's interest [must be based upon a finding that] the warrants have a recognizable present value in terms of a reasonable expectation that the market value of the common stock will in the foreseeable future exceed the exercise price of the warrants.

* * * * * * *

"We are not persuaded, however, that these statistics [showing the increase in the value of stocks of other investment companies over the preceding 12 years, as testified to by Mr. Tatham] can be relied on as showing that United's common stock will in the foreseeable future increase in value to the extent necessary to give the warrants a recognizable present value.

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"* * * we cannot find that there is a reasonable expectation that United's earnings and assets over the foreseeable future will be such that the market price of its common stock will increase to the extent needed to give the warrants a recognizable value."

6. Warrant holders argue the Commission's findings are inadequate as a matter of law and unsupported by

the evidence in the record. Warrant holders contend it is not enough for the SEC to be "not persuaded" or that it "cannot find" the warrants to have any foreseeable value. The argument is the Commission is under a statutory duty to affirmatively find there is no reasonable basis for the belief the price of the common stock may reach $27.50. The difference, say the warrant holders, between the two approaches is not a matter of semantics; it is a fundamental difference in meaning. The two cases, Niagara Hudson Power Corp. *v.* Leventritt, 340 U. S. 336, and *In re* Commonwealth & Southern Corp., D. C. Del., 84 F. Supp. 809, aff'd 3 Cir., 184 F. 2d 81, cert. den. 340 U. S. 929, relied upon by the SEC as justification for forfeiture, are distinguished by the warrant holders. In those cases it is claimed there was sufficient evidence to justify a conclusion the market price of the common stock would not in the foreseeable future reach the exercise price of the warrants, while in the instant case the evidence demonstrates if the market value of United stock follows the present pattern of both United's and the stock of similar investment companies, it will, within the next 15 years, not only reach but exceed the exercise price of the warrants.

7. Diamond, *et al.*, other warrant holders, join with the Committee in urging the application of § 7 of the Administrative Procedure Act, and contend the burden of proof is upon United to demonstrate cancellation of the warrants is fair. Upon the present record, it is urged the SEC's findings were not in accordance with applicable legal standards and not supported by substantial evidence. In fact, the argument is there is a lack of an affirmative finding of "no recognizable value" in the warrants. Diamond, *et al.*, assert no administrative body can merely state its ultimate finding of fact without indicating each of the factors it considered in reaching that finding. The suggestion is made the Plan should be disapproved and the proceeding remanded to the SEC with the Court out-

lining to the Commission "the legal and procedural framework within which it must operate, and that that framework rests not only upon the policy of the Act with respect to the type of securities which regulated companies should have outstanding, but equally important upon the necessity for the protection of the property rights, however 'tenuous', of all security holders."

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[A portion of the opinion of the Court below which deals only with objections of stockholders, now abandoned and here irrelevant, has been omitted.]

REMAINING PHASES OF THE PLAN BEFORE THE COURT FOR ENFORCEMENT.

The precise application of the SEC before this Court seeks approval of the cancellation of the outstanding warrants and proposed changes to the charter and by-laws. The proposed cancellation of the warrants is appropriate to effectuate the provisions of § 11 of the Act. On other occasions I have upheld the conclusions of the Commission that option warrants without investment value constitute an unnecessary complexity in the corporate charter of a registered holding company or subsidiary and a plan of cancellation is appropriate under § 11(b). *In re* United Gas Corp.,[35] I said:

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[35] *In re* United Gas Corporation, D. C. Del., 58 F. Supp. 501, 519, aff'd on appeal raising other issues, 3 Cir., 162 F. 2d 409.

There appears to have been two cases holding cancellation of option warrants having an investment value, in exchange for new securities in the reorganized company, appropriate to effectuate the provisions of §11(b) of the Act. Community Gas and Power Company, 22 S.E.C. 115, 142-3 (1946), enforced *In re* Community Gas and Power Co., D. C. Del. 71 F. Supp. 171, aff'd 3 Cir., 168 F. 2d 740, cert. den. 334 U. S. 846 (1948); Electric Power & Light Corp., Holding Company Act Release No. 8889 (1949) at pp. 70-74, enforcement order affirmed *In re* Electric Power & Light Corp., 2 Cir., 176 F. 2d 687, 691, stay denied 337 U. S. 903 (1949).

A similar ruling of this Court in *In re* Commonwealth & Southern Corp., D. C. Del., 84 F. Supp. 809, 811 (1949), was affirmed by the Court of Appeals and certiorari was denied, *supra*.

"The cancellation of all outstanding option warrants without compensation is bottomed on a realistic evaluation of the worth of such paper, originally issued as a form of 'bonus' in connection with the sale of other securities of United [Gas Corporation]. * * * It would obviously be unfair to hold out to investors the hope that at some remote time the option warrants will have value. While there might be situations where holders of option warrants should be permitted to participate in a plan under the United Light & Power doctrine, this is not the case."

The Supreme Court upheld this interpretation of § 11(b) in Niagara Hudson Power Corp. *v.* Leventritt, 340 U. S. 336, reversing Securities and Exchange Commission *v.* Leventritt, 2 Cir., 179 F. 2d 615.

§ 11(b)(2) of the Act does not define with particularity types of securities which constitute undue and unnecessary complexity.[36] The SEC's views demonstrate the warrants, considered either on the basis of option price of $27.50 per share or the reduced price of $19.25 a share, are based upon fictitious asset values, not related to assets and earning capacities of United.

The Committee argues provisions of the Act providing for divestment of holdings in public utility subsidiaries have been met with United's compliance and this eliminates jurisdiction of the SEC and the District Court to enforce the warrant cancellation provisions of the Plan, however necessary and fair, when submitted to the SEC. It is argued United, while a "holding company" when

[36] 1(b) of the Act declared the national interest and the interest of investors in the securities of holding companies and their subsidiaries are adversely affected "when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties." Further, §7 of the Act, which prescribes standards for the issuance of new securities, provides in subsection (d)(1) and (2) no such security may be issued if it "is not reasonably adapted to the security structure" of the issuer and of the other companies in the system or "is not reasonably adapted to the earning power" of the issuer.

the SEC approved the Plan, is no longer such but is a pure investment company and therefore the District Court is without statutory jurisdiction to approve the Plan. The fundamental concept that consummation of some provisions of a plan will destroy both SEC and District Court jurisdiction to see that the balance of the Plan is consummated, can not be supported. For example, by the time the Supreme Court approved cancellation of warrants in the Leventritt case, *supra*, Niagara Hudson Power had been dissolved, and had distributed all its holdings to subsidiary companies.[37] So, too, in Commonwealth & Southern Corporation, *supra*, the August 23, 1950, Court of Appeals opinion for this circuit noted the subject company had been dissolved and its assets distributed on October 14, 1949.[38] The critical jurisdictional fact is United must be regarded as a registered holding company. It is not the order of consummation of steps in its plan to cease to be a holding company which has major significance. Under § 2(a)(12) of the Act, "registered holding company" means a subject company whose registration is in effect under § 5. Such Registration remains in effect until the SEC issues an order pursuant to § 5(d) of the Act, terminating such registration upon such terms and conditions as the Commission finds and in such order prescribes as necessary for the protection of investors.

6. I think the proposed cancellation of the warrants is fair and equitable to the persons affected by the Plan. The test of fairness in corporate reorganizations is whether each security holder, in order of his priority, receives the equitable equivalent of the rights surrendered. In a § 11(e) reorganization of a solvent corporation, rights surrendered are valued as in a going concern. Investment value is the test, not market value. Otis & Co. *v.* S.E.C., 323 U. S. 624; S.E.C. *v.* Central-Illinois Securities

[37] Date of consummation of Plan was January 5, 1950 (see N. D. N. Y. 114 F. Supp. 683); Supreme Court opinion issued January 15, 1951.

[38] 3 Cir., 142 F. 2d 82.

Corp., 338 U. S. 96; Niagara Hudson Power Corp. *v.* Leventritt, *supra*.

A master factor to determine value of rights to be surrendered by holders of option warrants is an analysis of the terms of the warrants. Here, warrant holders are denied any rights as stockholders. For example, without affecting the option price of $27.50 per share, the common stockholders have the right to withdraw all increments in value that might be credited to earned surplus, whether ordinary income or capital gains, in the form of dividends. Increments may remain in the corporation and resultant increase in value per share may be prevented by a declaration of additional common shares in the form of a stock dividend. But, apart from the right of common stockholders to retain increments in value, the record of United's assets and earnings and market prices of its stock, supports the SEC's conclusion there is no reasonable expectation in the foreseeable future United's earnings or assets will be such that market price of its common stock will increase to give warrants a recognizable value. Test of value applied by the SEC—value based on reasonably foreseeable earnings and assets—is the criteria approved by the Supreme Court and by the Court of Appeals for this circuit in Niagara Hudson and Commonwealth & Southern cases, *supra*.

7. The profert of additional evidence by the Committee, and an independent reconsideration of such evidence, supplies no basis for a remand of the proceedings at bar to the SEC. That United has consummated substantial provisions of the Plan and no longer owns as much as 10% of the voting stock of any public utility company, is irrelevant. Evidence proferred by the Committee to show changes in assets and earnings of other investment companies would merely present, at this time, unpersuasive tabulations and computations originally supplied for the record before the SEC. This proffert of proof was fully considered by the SEC and it was dis-

posed of in its memorandum opinion and order of August 17, 1954. Increases subsequent to 1949 do not support—any more than do increases during the period 1937-49—a reasonable expectation market price of United's common will increase sufficiently to exceed exercise price of the warrants. More than that, it ignores basic differences among companies in terms of their investment policy, dividend policy, and leverage in capital structures. In sum, the remainder of the profert consists, at bottom, of matters of opinion and are clearly cumulative in relation to the opinion evidence which was already in the record before the SEC. The SEC's findings and conclusions, upon the terms of the Plan, providing cancellation of option warrants, and upon the SEC's rejection of the Committee's motion to re-open the record, are supported by substantial evidence and were arrived at in accordance with law.

The terms of the Plan submitted for enforcement should be approved in the form of an order in conformity with the views expressed herein, containing a provision the motion for the taking of additional evidence is denied, and a refusal to remand the case to the Securities and Exchange Commission.

At Wilmington,

JANUARY 17, 1955.

ORDER ENFORCING PROVISIONS OF PLAN.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

In the Matter of
THE UNITED CORPORATION } Civil Action No. 1650

A certain plan (the "Plan") and amendments thereto having been filed with the Securities and Exchange Commission (the "Commission") pursuant to the provisions

of Section 11(e) of the Public Utility Holding Company Act of 1935 (the "Act") by The United Corporation ("United"), a registered holding company, proposing (*a*) a Purchase Offer and an Exchange Offer to the holders of United common stock; (*b*) the disposition by United of certain of its holdings; (*c*) the cancellation of the outstanding option warrants to purchase the common stock of United, without compensation to the holders of such warrants; and (*d*) the amendment of United's Certificate of Incorporation so as to provide for cumulative voting for directors at stockholders' meetings, and the amendment of United's Certificate of Incorporation and By-laws so as to provide for an increase of quorum requirements from 25 percent to 50 percent of the shares entitled to vote; and

The Commission, after due notice and opportunity for hearing, having found the Plan necessary to effectuate the provisions of Section 11(b) of the Act and fair and equitable to the persons affected thereby; United having requested the Commission to apply to an appropriate court for an enforcement of said provisions of the Plan relating to the cancellation of United's option warrants and to the amendments of United's Certificate of Incorporation and By-laws; the Commission having approved the Plan by Findings and Opinion dated June 15, 1951, and memorandum opinion and order dated June 26, 1951, subject to the condition, among others, that said order would not be operative to authorize consummation of said provisions of the Plan until an appropriate United States District Court should enter an order enforcing said provisions of the Plan; and

The United States Court of Appeals for the District of Columbia Circuit having reviewed said order of the Commission and having affirmed it in its entirety; the United States Supreme Court having denied the petition for certiorari filed by certain common stockholders ("Phillips *et al.*,"), having granted a petition for cer-

tiorari filed by a General Protective Committee for holders of option warrants of United (the "Committee"), limited to the question as to the jurisdiction of a Court of Appeals or a District Court to review orders of the Commission, and having reversed the Court of Appeals in taking jurisdiction over the provisions of the Plan which the Commission in its order had made operative on enforcement by a United States District Court, and having upheld the jurisdiction of the Court of Appeals to review all other aspects of the Plan; said United States Court of Appeals having modified its judgment of affirmance in accordance with the mandate of the United States Supreme Court; and

The Commission by memorandum opinion and order dated August 17, 1954, having denied an application by the Committee for reopening the hearings and for leave to adduce additional evidence; and

The Commission, on October 11, 1954, having filed with this Court an application to enforce and carry out said provisions of the Plan relating to the cancellation of United's option warrants and to the amendments of United's Certificate of Incorporation and By-laws; this Court, by Order dated October 11, 1954, having fixed November 17, 1954, as the date for hearing upon said provisions of the Plan and having prescribed the notice to be given of such hearing, the time in which objections might be made to said provisions of the Plan, and the manner of making such objections; it appearing that due and sufficient notice of said hearing was given in accordance with the provisions of said Order of the Court dated October 11, 1954; and

Objections and briefs in support thereof having been filed by the Committee and Alfred A. Biddle, a holder of option warrants of United, by Herbert M. Diamond *et al.*, holders of option warrants of United, and by Phillips *et al.*, and communications opposing the cancellation of United's option warrants having been received from certain holders of such option warrants; and

Order Enforcing Plan.

The Committee and Biddle having made a motion herein for the taking of additional evidence; Phillips *et al.*, having made and subsequently withdrawn a motion herein for an order directing the Commission to enlarge the record, and having made a motion for summary judgment dismissing the objections of the holders of option warrants; Diamond *et al.*, having applied for an order remanding the case to the Commission for further proceedings; and

Hearings having been duly held herein on November 17, 1954, and November 22, 1954; the Commission, United, the Committee and Biddle, Diamond *et al.*, and Phillips *et al.* having appeared at said hearings by their respective counsel or *pro se;* all interested persons having been afforded an opportunity for hearing; and this Court having duly considered the Plan and the provisions thereof relating to the cancellation of United's option warrants and to the amendments of United's Certificate of Incorporation and By-laws, the objections thereto, and the record herein, having filed its Opinion herein dated January 17, 1955, and being fully advised in the premises:

It is Hereby Found, Ordered, Adjudged, and Decreed:

1. The Court finds and concludes that the findings of fact and conclusions of law embodied in the Findings and Opinion of the Commission dated June 15, 1951, the Memorandum Opinion and Order of the Commission dated June 26, 1951, and the Memorandum and Opinion and Order of the Commission dated August 17, 1954, annexed as Exhibits F, H, and J, respectively, to the Commission's application herein dated October 11, 1954, are supported by substantial evidence and were arrived at in accordance with legal standards.

2. Subject to the terms and conditions of said order of the Commission dated June 26, 1951, the provisions of the Plan relating to the cancellation of United's option warrants and to the amendments of United's Certificate of Incorporation and By-Laws are approved as fair and

equitable and as appropriate to effectuate the provisions of Section 11 of the Act, the objections thereto are overruled, and the Court hereby directs that said provisions of the Plan be enforced and carried out in accordance with the Plan and said order of the Commission and as hereinafter directed.

3. The motion of the Committee and Biddle for the taking of additional evidence, the motion of Phillips *et al.*, for summary judgment, and the motion of Diamond *et al.* for remand of the case to the Commission are denied.

4. This Court, for the purpose of carrying out said provisions of the Plan, but only to the extent necessary for that purpose, hereby takes exclusive jurisdiction of United and of its assets, whether now owned or hereafter acquired, and wherever located.

5. United shall retain possession of its assets and continue the operation of its business through its officers, directors, employees, and agents, except as otherwise provided by this Order, or any subsequent order herein; and they and each of them may enter into any transaction not inconsistent with the Plan and this Order, including the filing of any appropriate application or declaration or notice with the Commission in conformity with the Act and with the rules, regulations, and orders promulgated and issued by the Commission thereunder, in all cases where such filing would be required if this Court had not taken such jurisdiction.

6. United, acting by or through its officers, directors, employees, and agents, is hereby authorized, ordered, and directed to take or cause to be taken as soon as practicable, in accordance with the provisions and subject to the terms and conditions of the Plan and of said Order of the Commission dated June 26, 1951, all action necessary or appropriate to comply with this Order, and to carry into effect the amendments of United's Certificate

of Incorporation and By-laws as provided for in the Plan.

7. The President or Vice-President and the Secretary or Assistant Secretary of United are hereby authorized and directed, without further action by the directors or stockholders of United, to execute, acknowledge, and file under the applicable provisions of the General Corporation Law of the State of Delaware such certificates and other documents as may be necessary for United to consummate the Plan. Specifically, without limiting the generality of the foregoing, United is ordered to cause its Certificate of Incorporation to be amended so as to provide for cumulative voting for directors at stockholders' meetings, and to cause its Certificate of Incorporation and By-laws to be amended so as to provide for an increase of quorum requirements from 25 percent to 50 percent of the shares entitled to vote.

8. Effective forthwith, all rights and claims of the holders of the option warrants of United shall cease and determine, and all such warrants shall be void for all purposes.

9. United, its security holders, and all other persons are hereby permanently enjoined and restrained from doing any act or taking any action interfering or tending to interfere with these proceedings, or with the enforcement or carrying out of the provisions of the Plan relating to the cancellation of United's option warrants and the amendments of United's Certificate of Incorporation and By-laws, or with compliance with the orders of the Commission and of this Court approving and enforcing said provisions of the Plan, including the commencement or prosecution of any action, suit, or proceeding, at law or in equity or under any statute, in any court or before any executive or administrative officer, commission, or tribunal, other than such proceedings before the Commission or this Court as may be appropriate under the

Act and the rules and regulations promulgated thereunder, and such review, iff any, in an appropriate appellate court of the United States as may be provided by law.

10. This Court reserves jurisdiction to entertain such further proceedings, to make such further findings, to enter such supplemental orders and decrees, to take such further action, and to gramt such other and further relief as it may deem appropriatte in connection with the Plan, the transactions incident tthereto, and the consummation thereof, including the review, if application therefor is duly made, of subsequent orders of the Commission relating to the Plan. The foregoing reservation includes, but is not limited to, such jurisdiction as the Court may have herein with respect to the allowance of fees and expenses in the foregoing proceedimgs and any related proceedings.

By the Court,

S/ Paul Leahy,
Chief Judge.

At Wilmington,

March 7, 1955.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 11,627 and 11,645

IN THE MATTER OF
THE UNITED CORPORATION

HERBERT M. DIAMOND, ET AL.,
Appellants in No. 11,627

GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION AND ALFRED A. BIDDLE,
Appellants in No. 11,645

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued November 3, 1955

Before GOODRICH, STALEY and HASTIE, *Circuit Judges*

OPINION OF THE COURT

(Filed April 16, 1956)

By STALEY, *Circuit Judge.*

These are appeals from an order of the district court for the District of Delaware enforcing certain provisions of a voluntary plan submitted by The United Corporation and approved by the Securities and Exchange Commission under Section 11(e) of the Public Utility Holding Company Act of 1935 ("Act"), 15 U.S.C. § 79, et seq.

[redacted]

We are concerned only with that phase of the district court's order which cancelled outstanding warrants of The United Corporation without compensation to the holders.[1]

Appeals, challenging the cancellation, have been taken to this court by the General Protective Committee for the Holders of Option Warrants of The United Corporation and Alfred A. Biddle (No. 11,645) and by Herbert M. Diamond, et al. (No. 11,627). This opinion covers both appeals.[2]

The United Corporation is a holding company registered under the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C. § 79, et seq., and is, therefore, for the purposes of the Act, subject to the jurisdiction of the Commission. In 1943, the Commission directed that United cease to be a holding company and limit its corporate structure to a single class of common stock. United decided to comply with the Commission direction that it cease to be a holding company by transforming itself into an investment company. By the latter part of 1949, United, with the Commission's approval, had completed various steps in line with its proposed transformation into an investment company. In November, 1949, United submitted a further plan to complete its compliance with the 1943 order. The 1949 plan was amended in July, 1950, following which hearings on the plan were held. After certain modifications (not presently material), the Commission approved the plan which, among other things, provided for the cancellation of outstanding option warrants of The United Corporation, without compensation to the holders.[3]

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1 In re The United Corporation, 128 F. Supp. 725 (1955).

2 Although in the opinion we refer to questions raised by "appellants," some of the questions were not raised by all appellants. Also, all section numbers refer to sections of the Public Utility Holding Company Act of 1935.

3 The plan submitted in November, 1949, had proposed that new five-year warrants to purchase common stock at $7 per share would be issued in exchange for the outstanding perpetual warrants which allowed purchase of common stock at $27.50 per share. One new warrant was to be issued for five old ones.

Since, according to the Commission's order, cancellation was one phase of the plan which was to become effective only after enforcement by an appropriate United States District Court, the present application for enforcement was brought.[4]

Several arguments are advanced in support of the contention that the district court erred in approving and ordering enforcement of the cancellation. The first contention concerns the Commission's authority to approve and order changes in United's capital structure, which authority would extend to the cancellation of the warrants.

The Commission claims that by virtue of Section 11(b)(2)[5] of the Act, it has the authority to simplify the capital structure of a registered holding company and its subsidiaries, and since United is a registered holding company, the Commission had jurisdiction to order the cancellation. We think the Commission is correct.

In passing the Public Utility Holding Company Act, Congress was attempting to meet the problems and eliminate the evils that were connected with the public utility holding companies engaged in interstate commerce. To that end, Congress intended to compel the simplification of public-utility holding-company systems, and the elimination of such systems, except under such terms and conditions as were expressly provided in the Act. See Sec. 1(c).

As part of the plan to achieve these results, Congress, in Section 11(b)(1), specified a desideratum that holding-

4 Before the present application was brought, the Commission's order was appealed to the Court of Appeals for the District of Columbia and to the Supreme Court, which held that review in the Court of Appeals was not proper prior to a suit for enforcement in the district court. See General Protective Committee v. SEC, 346 U.S. 521 (1954); Downing v. SEC, 203 F.2d 611 (C.A.D.C., 1953). The Supreme Court's opinion also gives the details of other provisions of the plan and United's past actions under the Act.

5 The relevant part of § 11(b)(2) reads:

"(b) It shall be the duty of the Commission, as soon as practicable * * *:

"(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure * * *."

company systems be limited in their operations to a single integrated public-utility system.[6] Section 11(b)(2) specified a further desideratum, namely, the simplification of the corporate structure of a registered holding company and its subsidiaries.[7]

Compliance with the desired results of Sections 11(b)(1) and 11(b)(2) may be achieved by two routes. One is a procedure authorized in 11(b)(1) and 11(b)(2) whereby the Commission by order may require that designated steps be taken by a registered holding company or a subsidiary. The second method of compliance, under 11(e), is by a voluntary reorganization[8] which a registered holding com-

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6 Aside from exceptions which are not material, § 11(b)(1) reads:

"(b) It shall be the duty of the Commission, as soon as practicable * * *:

"(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system * * *."

7 Section 11(b)(2) also desired the elimination or dissolution of a registered holding company or any of its subsidiaries, see American Power & Light Co. v. SEC, 329 U.S. 90, 112-114 (1946), but we are concerned here only with the simplification feature of § 11(b)(2). We note also, in order to avoid confusion, that the simplification of corporate structures or the dissolution of companies was conditional upon a finding that the corporate structure or continued existence of a company unduly or unnecessarily complicated the structure, or, in other words, violated the standards set forth in the Act. See 329 U.S. at 113. We are not at this point concerned with that condition. In this part of the opinion we are concerned with whether the Commission had the authority to simplify United's capital structure. Later we will discuss whether it properly exercised its authority, that is, whether it made a proper finding that a "complication" was present.

8 "(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. * * *" § 11(e).

[redacted]

pany or a subsidiary proposed under a broad discretion which Congress left to management to determine how to bring their systems into compliance with 11(b)(1) and 11(b)(2). See General Protective Committee v. SEC, 346 U.S. 521, 529 (1954).

United's method of complying with Section 11(b) was by way of proposing a voluntary reorganization. As part of the reorganization, United proposed to become an investment company. This step would necessarily mean that there would be nothing further for United to do so far as Section 11(b)(1) was concerned. Section 11(b)(1) requires limitations in the operations of holding-company systems. Obviously, if United chose to become an investment company, it would be more than satisfying Section 11(b)(1). See General Protective Committee v. SEC, 346 U.S. at 530. Congress certainly did not contemplate that a registered holding company had to remain a holding company forever, the elimination of holding companies having been explicitly mentioned as one of the purposes of the Act. See § 1(c).

The appellants apparently go a step further, however, and argue that becoming an investment company not only satisfies Section 11(b)(1), but also 11(b)(2). Thus, it is said, since becoming an investment company satisfies both 11(b)(1) and 11(b)(2), nothing further can be required of a registered holding company, once it files a plan to become an investment company, so long as it in good faith pursues that end with reasonable expedition. Accordingly, the Commission had no jurisdiction to compel a change in United's capital structure.[9] We cannot agree with the appellants. Although one of the purposes of the Act was the elimination of holding companies, another purpose was the elimination of evils which had become part of the corporate structure of registered holding companies and their

9 It is clear that, since United was a registered holding company, the Commission could have compelled it to dissolve. Also, had the original intention been for United to remain a holding company, the Commission could have ordered the warrants cancelled and at some subsequent date ordered transformation into an investment company.

subsidiaries. Becoming an investment company will satisfy Section 11(b)(1), but it does not necessarily satisfy 11(b)(2), which requires the simplification of corporate structures. United was and is a registered holding company and, as such, clearly falls within the command of Section 11(b)(2).

There is nothing in Section 11(b) or elsewhere in the Act which says that the Commission cannot order simplification of the corporate structure of a registered holding company if the eventual result contemplated is an investment company.[10] Once United became a registered holding company, it came within the jurisdiction of the Commission and was subject to all requirements applicable to a registered holding company, including that requirement designed by Congress to eliminate evils which had become a part of holding-company systems. United would cease to be subject to requirements for *registered holding companies* only by an order of the Commission issued upon such terms and conditions as the Commission finds and "in such order prescribes as necessary for the protection of investors * * * ."[11] § 5(d). No such order was issued

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10 Appellants have pointed out that the legislative history, as found in Congressional committee reports (See Sen. Rep. No. 621, 74th Cong., 1st Sess.; House Rep. No. 1318, 74th Cong., 1st Sess.) indicates that holding companies were to choose either "(a) to turn themselves into investment trusts * * * or (b) to arrange or reduce their holdings in operating companies * * * so that each holding company will control the management of only a single system of operating companies." They say there was never the slightest suggestion that a holding company do both.

But the two alternatives mentioned above are desired results. The Committee Reports do not indicate that corporate structure could not be affected if a holding company chose the first alternative rather than the second, and we are not persuaded otherwise by the appellants' arguments concerning legislative history.

11 Under the Act, there is a difference between a *registered holding company* and a *holding company*. A *holding company* is a company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company, etc. § 2(a)(7).

A *registered holding company* is a *holding company* which has registered with the SEC. § 2(a)(12). Once a company becomes a *registered holding company*, it remains such until the Commission orders otherwise. § 5(d). Thus, a company does not cease to be a *registered holding company*, even though it is no longer a *holding company*, until the Commission issues its order.

by the Commission. The change in United's capital structure was, therefore, authorized.

But even though it had such authority, the Commission, by the terms of Section 11(b)(2), can only exercise its authority to remove those features in a corporate structure which "unduly or unnecessarily complicate the structure." This brings us to the next question raised on this appeal, and that is whether the outstanding warrants of United were such a complication.

The option warrants were perpetual and gave the holder the right to purchase common stock at $27.50 a share.[12] The Commission found that there was no reasonable expectation that the earnings and assets of United over the foreseeable future would be such that the market price of its common stock would increase to the extent needed to give the warrants a recognizable value. The Commission also found that the terms of the warrants were such that they conveyed an extremely tenuous right aside from what the future earnings and assets of the company might be. Accordingly, the Commission concluded that the warrants would be inherently deceptive to investors and perpetuate in the corporate structure useless and unnecessary complexities in contravention of Section 11(b)(2). The appellants contend that the complication referred to in Section 11(b)(2) has no relationship to the public or to future investors and that the complication must relate to internal matters affecting the corporation or its security holders. To begin with, such an argument flies directly into the hard facts of Congressional concerns in passing the Public Utility Holding Company Act. Not even the wisdom of judicial notice is necessary to know that that Act was not passed to protect the holding-company systems. It was the public interest and the interests of investors and con-

12 The warrants stated a price of $27.50, but because of certain capital distribution approved by the Commission, the question whether the exercise price should be lowered to $19.25 was left open. The conclusions of the Commission are the same whether a price of $19.25 or a price of $27.50 is used. This explains later references to the $27.50 and $19.25 figures.

sumers, both actual and potential. In American Power & Light Co. v. SEC, 329 U. S. 90, at 104 (1946), the Supreme Court, in discussing the meaning of terms in Section 11(b)(2), including the phrase "unduly or unnecessarily complicate," said:

> "* * * Even standing alone, standards in terms of unduly complicated corporate structures and inequitable distributions of voting power cannot be said to be utterly without meaning, especially to those familiar with corporate realities. But these standards need not be tested in isolation. They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear. See Intermountain Rate Cases, 234 U.S. 476. From these sources—from the manifold evils revealed by the legislative investigations, the express recital of evils in § 1(b) of the Act, the general policy declarations of Congress in § 1(c), the standards for new security issues set forth in § 7, the conditions for acquisitions of properties and securities prescribed in § 10, and the nature of the inquiries contemplated by § 11(a)—a veritable code of rules reveals itself for the Commission to follow in giving effect to the standards of § 11(b)(2)."

In line with the above, the Commission has significantly noted that

> "* * * in Section 1(b) of the Act, the Congress expressly declared that the national interest and the interest of investors in the securities of holding companies and their subsidiaries are adversely affected 'when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties.' Section 7(c) of the Act, which lists the type of securities which may be issued by a reg-

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istered company, does not include warrants. Moreover, Sections 7(d)(1) and (2) expressly provide that no security may be issued if it 'is not reasonably adapted to the security structure' of the issuer and of the other companies in the system or 'is not reasonably adapted to the earning power' of the issuer."

Concerning the meaning of undue or unnecessary complication, we note also that Section 11(e) provides that holding companies may submit voluntary plans "in accordance with such rules and regulations or order as the Commission may deem necessary or appropriate *in the public interest or for the protection of investors or consumers,*" and that the Commission, in issuing orders declaring that companies have ceased to be holding companies, may do so upon such terms and conditions as the Commission finds and prescribes as necessary *for the protection of investors.*

There can be no doubt that the complication referred to in Section 11(e) can properly apply to outstanding warrants which have been found valueless and which by their terms confer an extremely tenuous right upon the holders. See Central & South West Utilities Co. v. SEC, 136 F.2d 273 (C.A.D.C. 1943).

The last point raised on this appeal is whether the cancellation of the warrants was fair and equitable to the holders, as required by Section 11(e). The decision as to whether a plan of reorganization or some feature of it is fair and equitable is one which lies within the discretion of the Commission. Unless there is an abuse of that discretion, the Commission's decision, flowing as it does from its expert judgment, must be accepted so long as the decision is reached in accordance with law. Niagara Hudson Power Co. v. Leventritt, 340 U.S. 336, 347 (1951). As far as warrants are concerned, the Commission's duty

"* * * is first to determine the extent to which they reflect the value of the common stock upon which they

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have an option. If, for example, the market value of the common stock closely approaches the exercise price stated in the warrants, or if there is ground for a reasonable expectation that the two may coincide within the foreseeable future, then the warrants would have an intrinsic and investment value directly related to the common stock. Under those circumstances, we assume no plan of reorganization would be fair or equitable within the meaning of § 11(e) of the Act that did not recognize that value and provide an equitable equivalent for it.

"On the other hand, if the market value of the common stock is less than $15 per share and there is no ground for a reasonable expectation that, within the foreseeable future, the value will exceed $15 per share, then an option to buy it at, for example, $1,000 per share obviously would be worthless if the measure of its value depends only upon its convertibility into common stock. With such facts, it is difficult to see how the Commission could justify either the continuance of the warrants or any compensation for them at the expense of the existing common stock. The difference between the example last given and the facts of this case is merely one of degree. *Where the line is to be drawn is a matter for the expert judgment of* the Commission." Niagara Hudson Corp. v. Leventritt, 340 U.S. 336, 343-344 (1951) (emphasis supplied).

In this case the Commission found that, "The recent high market price [of United Corporation's stock] of 4¾ would have to increase about 5.8 times to reach an exercise price for the warrants of $27.50, and about 4 times to reach an exercise price of $19.25," and concluded that there was no reasonable expectation of such increases in the foreseeable future.

It reached this conclusion by considering United's assets as of December 31, 1950, and estimating future earn-

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ing capacity. It found that the market value of United's assets was approximately $60,000,000. The market value of the common stock would have to reach approximately $400,000,000 for the warrants to have any value at a $27.50 price. At the $19.25 price, the total market value would have to be $280,000,000. An analysis of the earning power indicated a future earning capacity of approximately 22 cents a share. The common stock would have to sell at approximately 130 times earnings to reach the exercise price of $27.50, or 90 times earnings to reach the $19.25 price. In addition, the Commission considered the terms of the warrants, which expressly provided that the right to purchase common stock meant common stock "as such stock may be constituted at the time of purchase * * * whether or not the rights or interests represented by the shares of Common Stock of the Company authorized or outstanding at the date hereof or at any other time prior to such purchase and irrespective of any change * * * by way of payment of stock dividends, sale, exchange or other disposition of any class of stock of the Company." The certificate also specifically provides that the warrant "does not entitle the holder * * * to any rights whatsoever as a stockholder of the Company." The Commission concluded that the warrant holders' interest was extremely tenuous because there was no protection against future corporate action which could effectively keep the net asset value per share low enough to prevent the common stock from reaching the warrant exercise price. The opinion evidence of two expert witnesses supports the findings of the Commission.

If United were to continue operations in the public utility area, apparently the appellants would have no serious challenge to the Commission's conclusions, nor could they because those conclusions were arrived at in accordance with proper legal standards and are supported by substantial evidence in the record. But they argue that the Commission erred because its analysis of United's future asset value and future earning capacity should have been

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based on the fact that United was going to become an investment company and would not continue in the public utility area. The Commission was well aware that United was to operate in the future as an investment company. It considered and discussed this in its opinion and concluded that, under all the circumstances and recognizing that United's earnings as an investment company are highly conjectural, it was proper to evaluate United on the basis of its current portfolio. It also discussed its rejection of the expert witness presented by the warrant holders. There is no need to review those considerations here. The Commission, exercising its expert judgment, did so, and no abuse has been shown.

The appellants also say that the two expert witnesses which the Commission contends supported its view did not actually do so. We have read that testimony and disagree with appellants.[13] Be that as it may, the Commission's conclusion is sufficiently supported by its own findings, independent of the experts.[14]

We also note that, on the same record, the Court of Appeals for the District of Columbia considered whether the cancellation of the same warrants was fair and equi-

13 The appellants have argued that when the experts testified about no expectation of value during the foreseeable future, they were referring to the foreseeable future of a five-year period. A reading of the testimony reveals no basis for this argument.

Hickey, for example, was asked, "Q. Going back to the old warrants, is it not a fact that you would have to have fantastic success as an investment company in order to have any intrinsic value in those warrants? A. Well, you would have to have great success, but perpetuity is a fantastically long time, too."

Wallace stated that the issuance of new warrants in exchange for the old could not be justified statistically. He said, "It is our conclusion that, on any basis of capitalization of reasonably anticipated earnings even over a very extended period, or on any basis of conceivable aggregate asset values, it was impossible to reach a value of as much as $27.50 for the common stock or therefore an intrinsic value for the warrants." At another point he said, "We can find no intrinsic value for the warrants on any recognized basis of valuation, but we are not prepared to say that there is not some small value there."

The full testimony clearly reveals that statements such as these were not limited to any five-year period.

14 There is no need to consider appellants' arguments concerning who had the burden of proving that the plan was fair and equitable. The record is sufficient to sustain the Commission's conclusions whether or not it had the burden of proof.

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table and found that it was. See Downing v. SEC, 203 F.2d 611 (C.A.D.C., 1953).

For the foregoing reasons, the order of the District court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,645

In the Matter of THE UNITED CORPORATION. General Protective Committee for Holders of Option Warrants of The United Corporation; and Alfred A. Biddle,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: GOODRICH, STALEY and HASTIE, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

April 16, 1956

APPENDIX B

(Holding Company Act Release No. 13088)

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C.
January 16, 1956

In the Matter of

THE UNITED CORPORATION
(File No. 30-116)
(Public Utility Holding Company Act of 1935)

Findings and Opinion of the Commission

SIMPLIFICATION OF HOLDING COMPANY SYSTEM

Termination of Holding Company Status

Application by registered holding company pursuant to Section 5(d) of Public Utility Holding Company Act of 1935 for order declaring that it has ceased to be a holding company, *granted* without holding hearing on matters raised by stockholder where such hearing is not necessary or appropriate and would involve the relitigation of contentions previously considered and rejected by the Commission and the Courts.

APPEARANCES:

Richard Joyce Smith and *William T. Farley*, of Whitman, Ransom and Coulson, and *John J. Burns*, of Burns, Blake & Rich, for The United Corporation.

Randolph Phillips, pro se.

William R. Nowlin, for the Division of Corporate Regulation.

The United Corporation ("United"), a registered holding company, has filed an application under Section

5(d) of the Public Utility Holding Company Act of 1935 ("Act") for an order declaring that it has ceased to be a holding company.[1] United asserts that it has fully complied with the order issued by the Commission on August 14, 1943, in proceedings under Section 11(b)(2) of the Act, directing the company to change its existing capitalization to one class of stock and to take such action as would cause it to cease to be a holding company. No order directing dissolution was issued, United being afforded an opportunity to achieve compliance with the Act by divesting itself of control of its utility subsidiaries and becoming an investment company.[2] United proposes, if its application for a Section 5(d) order is granted, to register under Section 8 of the Investment Company Act of 1940 as a closed-end, non-diversified investment company, as provided in its final plan approved by the Commission in 1951.[3]

In 1943 United had outstanding preference stock, common stock, and option warrants for the purchase of common stock, and it owned large blocks of voting securities, ranging from 13.9% to 26.1% of the total amounts outstanding, in four public utility holding companies. By five successive Section 11(e) plans and other action approved by the Commission, United reduced its holdings in each of these subsidiaries to less than 5%, retired all the preference stock, cancelled its option warrants, and

---

[1] Section 5(d) of the Act provides:

"Whenever the Commission, upon application, finds that a registered holding company has ceased to be a holding company, it shall so declare by order and upon the taking effect of such order the registration of such company shall, upon such terms and conditions as the Commission finds and in such order prescribes as necessary for the protection of investors, cease to be in effect. The denial of any such application by the Commission shall be by order."

[2] 13 S. E. C. 854.

[3] Holding Company Act Releases Nos. 10614 (June 15, 1951) and 10643 (June 26, 1951).

complied in all other respects with our 1943 order.[4] Appeals from a District Court order directing cancellation of the warrants[5] are pending in the Court of Appeals and applications for the allowance of fees and expenses in connection with United's final plan are pending before us, and we shall continue to have jurisdiction with respect to these two matters.

Randolph Phillips, a stockholder of United filed a request for a hearing and asked that we direct United to be dissolved and otherwise deny the application. He also asked that the 1943 Findings, Opinion and Order be modified so as to reflect conversations between certain of the then members of this Commission and William M. Hickey, president of United, John J. Burns, a United director and special counsel, and Richard Joyce Smith, United's general counsel. Phillips' request recites that those conversations occurred after the record in the 1943 proceeding had been closed and the matter was submitted to the Commission for decision, and he alleges that they thereby improperly influenced the Commission to withhold a dissolution order and to permit United to become an investment company. Phillips further requests that, if dissolution is not directed and United's application is

[4] 17 S. E. C. 404 (1944), aff'd *sub nom. Phillips* v. *S. E. C.*, 153 F. 2d 27 (C. A. 2, 1946), certiorari denied, 328 U. S. 860; 19 S. E. C. 190 (1945); *The United Gas Improvement Company*, 22 S. E. C. 286 (1946); Holding Company Act Release No. 6836 (August 9, 1946); 25 S. E. C. 259 (1947), appeal dism'd *sub nom. Phillips* v. *S. E. C.*, 171 F. 2d 180 (C. A. 2, 1948); 28 S. E. C. 347 (1948), enf'd 82 F. Supp. 196 (D. Del., 1949); Holding Company Act Release No. 9431 (October 20, 1949), aff'd *sub nom. Phillips* v. *S. E. C.*, 185 F. 2d 746 (C. A. D. C., 1950); Holding Company Act Releases Nos. 10614 (June 15, 1951) and 10643 (June 26, 1951), aff'd *sub nom. Downing* v. *S. E. C.*, 201 F. 2d 611 (C. A. D. C., 1953), petition for certiorari by Phillips and Downing denied 346 U. S. 930, aff'd in part and rev'd in part on jurisdictional grounds *sub nom. General Protective Committee* v. *S. E. C.*, 346 U. S. 521 (1954), enf'd *sub. nom. In re The United Corporation*, 128 F. Supp. 725 (D. Del., 1955), appeal pending.

[5] *In re The United Corporation*, 128 F. Supp. 725 (D. Del., 1955).

granted, we condition the Section 5(d) order so as to prevent United's retention of Hickey, Burns and Smith as officers, directors, counsel or employees, to require a new election of directors within three months, and to prevent United from taking any steps to eliminate cumulative voting from its certificate of incorporation for five years.

We notified the participants that we would treat Phillips' request for hearing, insofar as it contains factual allegations, also as an offer of proof, would afford United and the Division of Corporate Regulation ("Division") an opportunity to submit a reply to his request, and would hear oral argument on the question whether it is necessary or appropriate to hold an evidentiary hearing in order to enable us to dispose of United's application in accordance with proper legal standards. Replies were filed, and at the oral argument Phillips withdrew his request for an order of dissolution. After due consideration of the record, we have concluded that an evidentiary hearing is not necessary or appropriate and would involve the relitigation of claims and contentions that have been previously considered and rejected by the Commission and the Courts, that United's application pursuant to Section 5(d) of the Act should be granted without the conditions sought by Phillips, and that the other relief requested by him should be denied.

In our opinion an evidentiary hearing would serve no useful purpose since, even if Phillips' allegations were proved, it would not in the circumstances presented warrant the relief sought by him. Neither Phillips nor the Division has taken issue with United's assertions in the application as amended that it has no representatives on the boards of directors of any of its former statutory subsidiaries, and that it does not now exercise directly or indirectly, either alone or pursuant to an arrangement or

understanding with one or more other persons, a controlling influence over the management or policies of any of those subsidiaries, or of any other public utility or holding company. Under the circumstances we find that United is no longer a holding company within the meaning of the Act.[6]

No appeal was taken from the 1943 Findings, Opinion and Order which Phillips now seeks to modify. Indeed, Phillips expressed approval of that order both before and after he learned of the conversations in question, and although his request in connection with the instant application at first sought an order of dissolution such request as we have noted was later withdrawn. Moreover, Phillips has on two previous occasions attacked the 1943 decision in the Court of Appeals on the basis of these conversations, without success. The Court of Appeals for the District of Columbia Circuit affirmed the Commission's order approving United's fourth plan without referring to Phillips' contentions,[7] and on the appeal from the Commission's order approving United's final plan, that Court denied Phillips' motion for leave to adduce additional evidence with respect to such conversations, upon the ground that the 1943 order was not subject to review in the proceedings before it, and was fair on its face and not basically unsound.[8]

Nor do we think that the termination of the employment by United of Hickey, Burns, and Smith would be a necessary condition for the protection of investors. A similar question arose in the proceedings on the final plan, when Phillips proposed among other things disapproval

[6] If it should appear subsequently to the issuance of an order granting United's application under Section 5(d) that it was exercising a controlling influence on any public utility or holding company, we would have the power under the act to take appropriate action.

[7] *Phillips* v. *S. E. C.*, 185 F. 2d 746 (C. A. D. C., 1950).

[8] *Downing* v. *S. E. C.*, 203 F. 2d 611, 615 (C. A. D. C., 1953), certiorari denied, 346 U. S. 930.

of any management for United which included these same individuals. This proposal apparently stemmed from Phillips' contention that Hickey and other management representatives conducted United's 1947 stockholders' meeting improperly and illegally recessed it in order to gain time to secure a favorable vote. What the Commission stated on that occasion is equally applicable to Phillips' request here:

> "At this point the controversy pressed by Phillips with respect to the propriety of United's management at the 1947 meeting and subsequent thereto can be considered relevant at most only to the question of the integrity of United's management and its qualification to continue as representatives of stockholders. We do not think we should, under the circumstances, undertake to interfere on such a question with the normal processes of corporate elections and in effect substitute our judgment for that of United's stockholders, with whom the choice of directors properly resides * * *. Through the proxy solicitation machinery available within the ambit of our rules, stockholders desiring to oppose the management may communicate their views to the other stockholders and the management may reply thereto. Such material will serve as a guide to the stockholders in expressing their independent judgment in choosing the directors."[9]

We also do not consider it necessary to impose the other conditions urged by Phillips noted above. In view of our decision which permits the retention of the present management, and since an election was held at the annual meeting in April 1955, which Phillips does not attack, we

[9] Holding Company Act Release No. 10614, page 52 (June 15, 1951).

see no reason for requiring a special election of directors in advance of the next regular meeting. Nor do we find any valid basis for restricting the right of stockholders of United to eliminate cumulative voting. In the proceedings on United's final plan we rejected Phillips' proposal that we require that cumulative voting requirements may not be changed except at the vote of two-thirds of the stock instead of a majority. This ruling was approved by the District Court for the District of Delaware which stated:

> "Correctly, too, I think the SEC has determined not to interfere with the right of stockholders of United, if action is taken under Delaware law, the Investment Company Act and the proxy requirements of the Securities Exchange Act, to alter cumulative voting provision by vote of the majority of all stock. This determination by the SEC was made after complete consideration of all evidence and is consistent with law; and it represents a proper exercise of the discretion of the SEC."[10]

An appropriate order will issue.

By the Commission (Chairman Armstrong and Commissioners Adams, Orrick, and Patterson).

ORVAL L. DUBOIS,
Secretary.

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[10] *In re The United Corporation*, 128 F. Supp. 725, 737 (D. Del., 1955), appeal pending on other grounds.

Appendix B

72a *Commission's Order of January 16, 1956*

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

January 16, 1956

In the Matter of THE UNITED CORPORATION (File No. 30-116) (Public Utility Holding Company Act of 1935)	Order

The United Corporation ("United"), a registered holding company, having filed an application and amendments thereto under Section 5(d) of the Public Utility Holding Company Act of 1935 ("Act") for an order declaring that it has ceased to be a holding company;

Randolph Phillips, a stockholder of United, having filed a request for a hearing with respect to certain matters raised by him and for other relief, replies thereto having been filed, and oral argument having been heard;

The Commission having this day issued its Findings and Opinion; on the basis of said Findings and Opinion

IT IS ORDERED that the said request of Randolph Phillips be, and it hereby is, denied, and that the application of United under Section 5(d) of the Act be, and it hereby is, granted, subject to the following terms and conditions:

1. Jurisdiction be, and it hereby is, reserved with respect to unsettled claims for fees and expenses in connection with proceedings under the Act.
2. Jurisdiction be, and it hereby is, reserved for the purpose of entertaining such further proceedings and entering such further orders as may be necessary or appropriate in connection with the pending appeals involving United's stock option warrants.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

APPENDIX C

EXTRACTS FROM TESTIMONY OF CHARLES TATHAM, JR.

(4047 R) MR. MULFORD:—I would like to have this document marked for identification as Option Warrant Committee Exhibit No. 15.

HEARING EXAMINER:—It may be so marked.

(Option Warrant Committee's Exhibit No. 15 was marked for identification.)

(4048 R) By MR. MULFORD:

Q. Was this chart prepared under your supervision and is it correct? A. It was so prepared and it is correct.

Q. Will you explain the significance of this chart? A. This chart shows on logarithmic graph paper certain extremely significant historical price relationships between the common stock and the option warrants.

Described briefly, it shows that the warrants with remarkable consistency have tended to sell at a specific percentage of the common stock, this percentage rising as the price of the common rose, and declining as the price of the common declined.

While the data are shown in dollars and cents, the use of logarithmic graph paper places the relationships on a percentage basis.

The left hand vertical scale measures the price of the common stock from 10 cents at the bottom of the scale to $100 at the top of the scale.

The bottom horizontal scale measures the price of the option warrants from one tenth of one cent (one mill) at the left hand side of the scale to $100 at the right hand side of the scale.

The circled dots represent the annual high and low prices of the common stock measured on the vertical scale (4049 R) and the corresponding high and low prices of the option warrants measured on the horizontal scale. For example, the circled dot in the extreme lower left hand corner of the chart shows that the 1941 low price of

the stock was 18.75 cents, as shown by the left hand vertical scale. The 1941 low price for the option warrants was 3.9 mills as shown by the horizontal scale.

The 1929 high price for the common is indicated by the circled dot in the extreme upper right hand corner of the chart at $75.50 per share. This same point on the chart indicates the 1929 high for the warrants at $47.875.

The intervening circled dots clearly show the straight-line pattern formed by the price of the common and the warrants when their annual highs and lows are matched. This pattern reflects a relationship which has persisted for 21 years with impressive consistency.

I believe that this historic relationship can be used as a significant guide in an attempt to arrive at a reasonable value for the warrants in relation to any indicated price for the common stock.

For example, the recent closing price (August 7th, 1950) of 4 for the common would indicate a normal market value for the warrants of approximately 75 cents. This is indicated by dropping a vertical from the point at which the trend line crosses 4 on the left-hand scale. This (4050 R) vertical hits very close to 75 cents on the horizontal scale.

A future reasonably foreseeable value of $10 for the common would indicate a comparable value of approximately $3.25 for the warrants. Should the common attain a market value of about $30, the corresponding value of the warrants would be approximately $19.

What the chart does is to very clearly bring out the rising percentage price ratio of the warrants as the market price of the common advances. It also indicates that in view of the historic straight-line correlation, any substantial deviation therefrom is presumably due to the impact of abnormal or temporary factors.

* * * * * * *

Appendix C

Extracts From Testimony of Charles Tatham, Jr. 75a

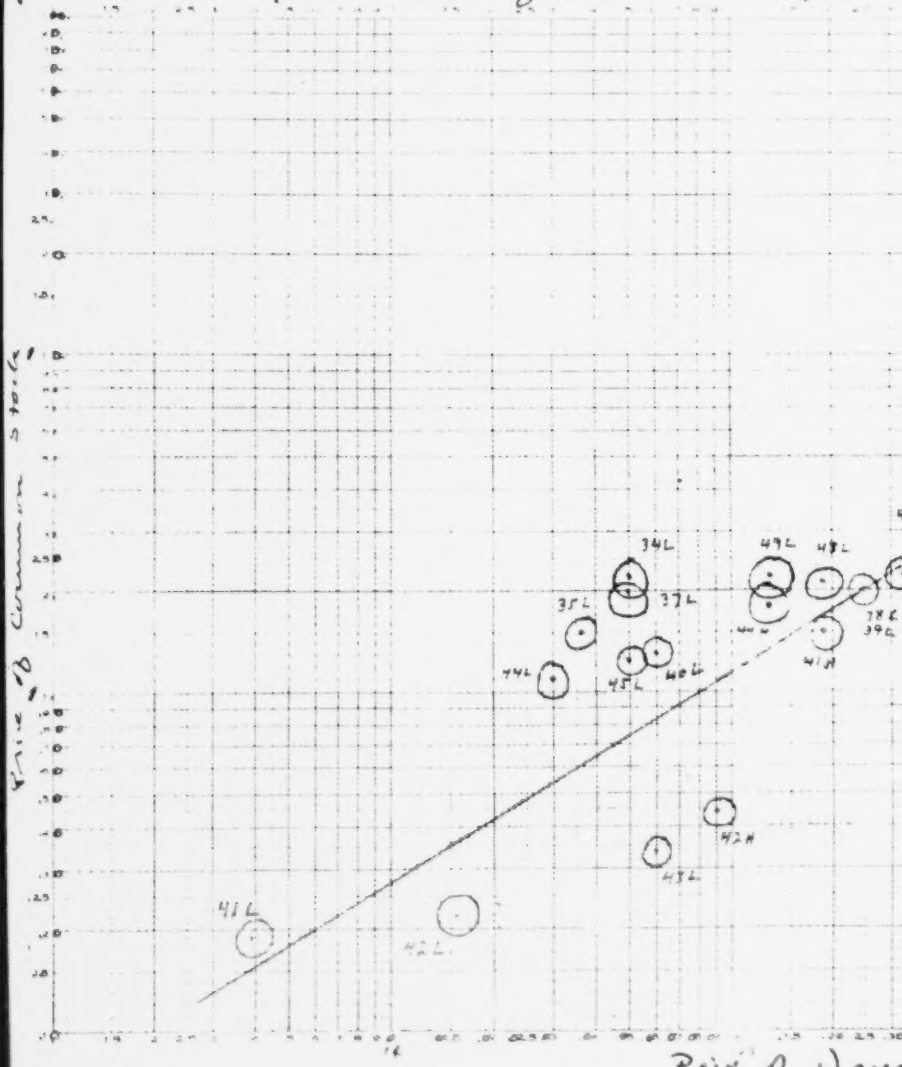
(4077 R) MR. MULFORD:—Mr. Examiner, I would like to offer in evidence Warrant Holders' Committee Exhibits 9 through 24.

HEARING EXAMINER:—They may be received.

(Warrant Holders' Committee Exhibits 9 through 24 were received in evidence.)

THE UNITED CORPORATION

Annual High and Low Prices of Common Stock and Option W



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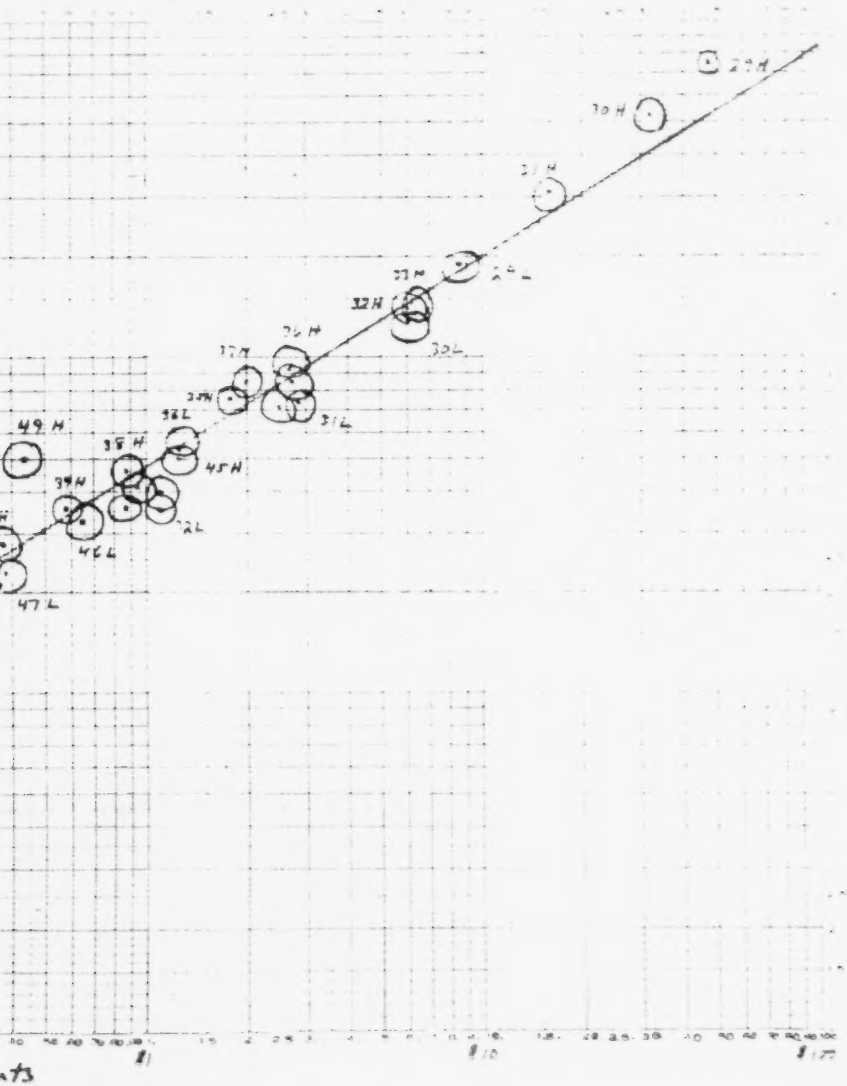
Warrant Holders Committee 15



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COMMITTEE EXHIBIT 15.

APPENDIX D

77a *Section 11(b) in Senate Bill 2796.*

Section 11(b) in Senate Bill 2796,
74th Congress, Senate Report No. 621, May 13, 1935.

It shall be the duty of the Commission, after notice and opportunity for hearing—

(1) After January 1, 1938, to require each registered holding company and each subsidiary company thereof to divest itself of any interest or control over property or persons to the extent that the Commission finds necessary or appropriate to limit the operations of the holding-company system of which such company is a part to a single geographically and economically integrated public-utility system and such business as is reasonably incidental, or economically necessary or appropriate, to the operations of such system;

(2) After January 1, 1938, to require each registered holding company and each subsidiary company thereof, to be reorganized or dissolved whenever the Commission finds that the corporate structure or continued existence of such company unduly or unnecessarily complicates the structure of the holding company system of which it is a part, or unfairly or inequitably distributes voting power among the holders of securities, or is detrimental to the proper functioning of a single geographically and economically integrated public-utility system; and

(3) Promptly after January 1, 1940, to require each registered holding company, to take such steps (either by divesting itself of control, securities or other assets, or by reorganization or dissolution, or otherwise) as the Commission finds necessary or appropriate to make such company cease to be a holding company: *Provided, however*, that the Commission, upon such terms and conditions as it may find necessary or appropriate in the public

interest or for the protection of investors or consumers, shall permit a registered holding company to continue to be a holding company if such company has obtained from the Federal Power Commission a certificate that the continuance of the holding-company relation is necessary under the applicable State or foreign law, for the operations of a geographically and economically integrated public-utility system serving an economic region in a single state or extending into two or more contiguous states or into a contiguous foreign country.

APPENDIX E

79a *Extract from Transcript of Hearing Before the District Court—Statements of Commission Counsel.*

EXTRACT FROM TRANSCRIPT OF HEARING BEFORE THE DISTRICT COURT—STATEMENTS OF COMMISSION COUNSEL.

(20 R) THE COURT:—What is complex about a person holding a piece of paper and having eternal hope springing in his breast?

MR. ISAACS:—The real complexity is in the impact of that on the investment world, and one of the major purposes of the Holding Company Act——

THE COURT:—What was the evidence as to the impact on the financial world before the Commission?

MR. ISAACS:—The evidence is that you have a piece of paper which people were continuing to pay money for. Apparently, your Honor will see from these letters that people regarded that as though it were an investment, a conservative investment in The United Corporation, and people paid at various times money ranging from fractions of a cent to over a dollar for these pieces of paper that actually represent no investment rights whatsoever, no investment values whatsoever; and as long as pieces of paper like that remain outstanding you have a tool for the deception of investors which is, in (21 R) the judgment of the Commission and of the Court of Appeals, in conflict with the attempt of the Holding Company Act to limit securities outstanding of these regulated companies to sound securities in sound corporations.

* * * * * * *

THE COURT:—* * * the question I put to you is What is the terrific impact on the financial world?

MR. ISAACS:—It is factual again. Anywhere from several hundreds of thousands of dollars to millions of dollars are wasted in the purchase of pieces of paper like this in the belief that they have value, where they are

Appendix E

Extract from Transcript of Hearing Before the District Court—Statements of Commission Counsel. 80a

basically worthless pieces of paper and the statute requires them to be (22 R) eliminated.

THE COURT:—In short, you are taking a paternalistic approach. You want to protect these people from buying pieces of paper.

MR. ISAACS:—Your Honor, the Holding Company Act is, unlike the Securities Act, a paternalistic Act.

* * * * * * *

(32 R) MR. ISAACS:—* * * The warrants represent, as I said, an expression of hope, a gamble, a sheer speculation on a piece of paper or a right that may have value if the market hits a certain point.

AUG
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 251

THE GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION AND ALFRED A. BIDDLE,
Petitioners,

v.

THE UNITED CORPORATION AND THE SECURITIES AND EXCHANGE COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED CORPORATION IN OPPOSITION

RICHARD JOYCE SMITH,
Attorney for The United Corporation,
No. 40 Wall Street,
New York 5, N. Y.

WILLIAM S. POTTER,
WILLIAM T. FARLEY,
WILLIAM R. SHERWOOD,
Of Counsel.

Dated: August 9, 1956.

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In the Matter of United Gas Corporation, Holding Company Act Release No. 5271 (1944) enforced *In re United Gas Corporation*, 58 F. Supp. 501 (D. C. Del. 1944) aff'd on appeal raising other issues, 162 F. 2d 409 (3d Cir. 1947) 6

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

THE GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION AND ALFRED A. BIDDLE,

Petitioners,

v.

THE UNITED CORPORATION AND THE SECURITIES AND EXCHANGE COMMISSION,

Respondents.

BRIEF FOR THE UNITED CORPORATION IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit (Appendix A, p. 51a) is reported in 232 F. 2d 601. The opinion of the United States District Court for the District of Delaware (Appendix A, p. 25a) is reported in 128 F. Supp. 725. The findings and opinions of the Commission (Holding Company Act Release No. 10614, and, on rehearing, Holding Company Act Release No. 12621) are unreported.

Note: For convenience, The United Corporation will sometimes be referred to as "United", the Securities and Exchange Commission as "the Commission", the Public Utility Holding Company Act of 1935 as "the Act" and The General Protective Committee for Holders of Option Warrants of The United Corporation as "the Committee".

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit (Appendix A, p. 64a) was entered on April 16, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), 62 Stat. 928.

Questions Presented

The Commission approved under Section 11(e) of the Act a plan of United, a registered holding company, to complete its transformation into a registered investment company. Among other things, the plan provided for the cancellation of outstanding option warrants to purchase Common Stock of United. The cancellation of the warrants was enforced by order of the United States District Court for the District of Delaware and on appeal that order was sustained by the United States Court of Appeals for the Third Circuit. The questions presented are:

1. Does the fact that United's plan contemplated it would cease to be a holding company and become an investment company or the fact that United, prior to the Commission's approval of the plan, had reduced its holdings in the voting securities of statutory subsidiaries below the 10% level render the Commission powerless to require the elimination of the warrants from United's capital structure as a useless and unnecessary complexity?

2. Was the Commission's finding that the warrants had no recognizable value supported by substantial evidence?

3. Is the decision of this Court in *Niagara Hudson Power Corporation v. Leventritt*, 340 U. S. 336, decisive of this case?

Statute Involved

The pertinent provisions of the Public Utility Holding Company Act of 1935 (49 Stat. 803-838, 15 U.S.C. §§79-79z-6) are set forth in the Petition, pages 4-6.

Statement of the Case

By its judgment entered April 16, 1956, the Court of Appeals affirmed the order of the District Court, dated March 7, 1955, which approved the order of the Commission, dated June 26, 1951, providing for the cancellation of the warrants, as fair and equitable and as appropriate to effectuate the provisions of Section 11 of the Act.

The petition for certiorari herein appears to be based, in substantial part, on the contentions (a) that the Commission was powerless under Section 11(b)(2) of the Act to compel the elimination of the warrants as an unnecessary complexity in United's corporate structure because United elected to cease to be a holding company and to become an investment company, and (b) that even if initially the Commission might have had power to require the cancellation of the warrants, the power was lost when United through intermediate action, and before the order to cancel the warrants had been issued, reduced its holdings of the securities of subsidiaries below the ten per cent level (fixed in the statute as the level at which the holding company status existed).

The petition is also based on the contention that the *Leventritt* case, in which this Court sustained the cancellation of warrants of a public utility holding company, is distinguishable because (a) United is to continue in existence whereas Niagara Hudson Power Corporation was to be dissolved, and (b) the continued existence of the United warrants would not deprive the holders of Com-

mon Stock of anything of value as would compensation of warrant holders in cash or stock. There appears to be no contention that the warrants had intrinsic or recognizable value as opposed to purely speculative value.

Summary of Argument

The Commission's power under Section 11(b)(2) of the Act to simplify the corporate structure of United did not terminate merely because during the course of its reorganization and as part of a plan of reorganization, which included elimination of the option warrants, United reduced its holdings of the voting securities of its statutory subsidiaries below the level at which, as defined in the Act, the holding company status exists or because United's plan contemplated that it would cease to be a public utility holding company and become an investment company. The power of the Commission to require compliance with the provisions of the Act continued until the Commission itself surrendered that power in an order entered under Section 5(d) of the Act. The Commission having found that the continuation of option warrants, which represented an extremely tenuous and unrealistic privilege to purchase Common Stock, would perpetuate in United's corporate structure useless and unnecessary complexities, their elimination was required by the Act. There remained only the question of the compensation, if any, to be awarded the warrant holders.

The Commission's finding that the warrants were without recognizable value was supported by substantial evidence and lay within a field in which the Commission is particularly competent to act. This finding required the elimination of the warrants without compensation to their holders, since any such compensation would necessarily be at the expense of the holders of the Common Stock.

The distinctions sought to be drawn by the Committee between this case and *Niagara Hudson Power Corporation* v. *Leventritt*, 340 U. S. 336, are without merit, and that case is decisive of the issues here sought to be raised.

ARGUMENT

The perpetual warrants were properly held by the Commission to constitute an unnecessary complexity in a holding company's structure, and the Commission was justified under Section 11 of the Act in directing their elimination in United's reorganization.

In two cases plans which provided for the elimination of warrants of admitted value, with, of course, compensation in another form to their owners, were found by the Commission to be necessary to effectuate the provisions of Section 11(b) of the Act and these plans were subsequently enforced.

> *In the Matter of Community Gas and Power Company*, 22 S.E.C. 115 (1946), enforced *In re Community Gas and Power Co.*, 71 F. Supp. 171 (D.C. Del. 1947), aff'd 168 F. 2d 740 (3d Cir. 1948, cert. den. 334 U. S. 846 (1948);
>
> *In the Matter of Electric Power & Light Corporation*, Holding Company Act Release No. 8889 (1949), enforcement order aff'd *In re Electric Power & Light Corp.*, 176 F. 2d 687 (2d Cir. 1949), stay denied 337 U. S. 903 (1949).

In three other cases plans which provided for the elimination of warrants determined to be of purely speculative value, without compensation to their owners, were found by the Commission to be necessary to effectuate the provisions of Section 11(b) of the Act and these plans were subsequently enforced.

In the Matter of United Gas Corporation, Holding Company Act Release No. 5271 (1944), enforced *In re United Gas Corporation*, 58 F. Supp. 501 (D.C. Del. 1944), aff'd on appeal raising other issues, 162 F. 2d 409 (3d Cir. 1947);

In the Matter of Niagara Hudson Power Corporation, Holding Company Act Release No. 9295 (1949), enforced *In re Niagara Hudson Power Corporation*, 86 F. Supp. 697 (N.D.N.Y. 1949), rev'd, *Securities and Exchange Commission* v. *Leventritt*, 179 F. 2d 615 (2d Cir. 1950), rev'd, *Niagara Hudson Power Corporation* v. *Leventritt*, 340 U. S. 336 (1951);

In the Matter of The Commonwealth & Southern Corporation, Holding Company Act Release No. 8633 (1948), enforced *In re Commonwealth & Southern Corp.*, 84 F. Supp. 809 (D.C. Del. 1949), aff'd *Commonwealth & Southern Corp.* v. *S.E.C.*, 184 F. 2d 81 (3d Cir. 1950).

Thus, it is well established that perpetual or long term warrants are to be considered undue complexities in the capital structure of a public utility holding company subject to reorganization under the Act.

The fact that by the time the Commission ordered the warrants cancelled United had sold or otherwise disposed of sufficient voting securities of its system companies so that it no longer owned as much as ten per cent of any, is immaterial. All such sales and other dispositions were steps in an overall plan of reorganization. Procedural and administrative details, such as the order in which the various steps in a plan of reorganization are taken, cannot affect the basic rights of security holders or the power of the Commission to require compliance with the Act.

Cf. *S.E.C.* v. *Central-Illinois Securities Corp.*, 338 U. S. 96 (1949);
Otis & Co. v. *S.E.C.*, 323 U. S. 624 (1945).

Nor can it be successfully contended that there was no necessity for modifying the corporate structure of United in conformity with the requirements of Section 11(b)(2) of the Act because its plan of reorganization called for it to become a registered investment company instead of continuing in the public utility field. The court below in considering this argument pointed out that United continued to be a registered holding company until the Commission ordered otherwise under Section 5(d) of the Act, that warrants are not one of the types of securities which a registered holding company may issue under Section 7(c) of the Act, and that in issuing an order under Section 5(d) to terminate the holding company status the Commission could attach such terms and conditions as it deemed "necessary or appropriate in the public interest or for the protection of investors or consumers." Moreover, Section 18(d) of the Investment Company Act of 1940 makes it unlawful under most circumstances for a registered investment company to issue warrants that mature in more than 120 days. It cannot be assumed that the Congress, which recognized the possibility of the transformation of a public utility holding company into an investment company, intended that a company so transformed could continue to have outstanding option warrants deemed improper securities for issuance by public utility holding companies and investment companies as well.

In any event, United remained a registered holding company until the Commission entered its order under Section 5(d) of the Act. Nowhere in the Act is there any provision authorizing the Commission to apply different

standards to different registered holding companies merely because their plans for the future differed. Therefore, before the Commission could properly find that the requirements of Section 11(b)(2) had been met, it necessarily had to decide whether a continuation of the warrants would be consistent with the standards of corporate simplification established by the Act.

The Commission's finding that the warrants were without recognizable value was supported by substantial evidence and in accordance with applicable legal standards

In reaching its conclusion that cancellation of United's option warrants was fair and equitable under the standards of the Act, the Commission had before it abundant evidence relating to the value of the warrants. The record contained the expert testimony of William M. Hickey, President of United, that there was no possibility, in the reasonably foreseeable future, of United's Common Stock reaching $27.50 per share, the exercise price of the warrants. (See Appendix A, p. 15a.) Mr. Hickey's testimony was corroborated in all respects by Alan W. Wallace, Vice President of Moody's Investors Service, who had made an independent study of the matter. (See Appendix A, p. 16a.)

The record also contained the testimony of Charles Tatham, Jr., Secretary of the Committee and the only witness the Committee chose to produce. (See Appendix A, p. 17a, *et seq.*) His testimony, in the main, was concerned with the market records of securities of *other* companies, and was based upon wholly conjectural assumptions.

On the basis of this record, the Commission concluded that United's option warrants were not entitled to any participation in United's reorganization. The Commission's findings in this connection, upon the evidence before it, may be summarized as follows:

1. The warrants confer no interest in United's present assets and earnings, but merely afford the warrant holder the tenuous privilege of securing Common Stock, upon tender of the exercise price, with no right to require that earnings be applied to improve the value of the Common Stock he has the option to purchase (Appendix A, p. 14a.)

2. Since 1931, the market price of United's Common Stock never exceeded $14.50 (as against the exercise price of $27.50). On the other hand, the stock has sold as low as 18¾¢ (Appendix A, p. 16a).

3. It would be necessary for United's assets to appreciate to about $400,000,000, or approximately 565 per cent over the $60,000,000 of assets at the time, in order to attain a value equivalent to the warrant exercise price of $27.50. To reach a value equivalent to the reduced exercise price of $19.25 for which the Committee contends,* United's assets would have to appreciate to $280,000,000, or approximately 365 per cent over $60,000,000 (Appendix A, p. 19a).

4. As an investment company, United will follow a policy of paying out in dividends to the Common stockholders a very large proportion of its earnings and profits, so that little improvement in the asset value of the Common Stock resulting from retention of earnings can reasonably be expected (Appendix A, p. 19a).

5. The statistics furnished by the Committee cannot be relied upon as showing that United's Com-

* Contrary to the suggestion in the Committee brief, United does not in any way acquiesce in the Committee's proposal that the exercise price of the warrants be reduced to give effect to a capital distribution to United's stockholders. Under its contract with the warrant holders, United was free to make distributions of capital at any time without making corresponding adjustments in the exercise price of the warrants.

mon Stock will appreciate in value in the foreseeable future to the extent necessary to give the warrants a recognizable present value (Appendix A, p. 19a).

This Court has held that the function of the courts in reviewing a Section 11 plan is at an end if it is determined that the Commission's findings as to valuation are supported by substantial evidence and arrived at in accordance with legal standards (*S.E.C.* v. *Central-Illinois Securities Corp., et al.*, 338 U. S. 96, 126 (1949)). In affirming the Commission's Order herein, both the District Court and the Court of Appeals found that the Commission's conclusion that United's option warrants are securities without present or reasonably foreseeable value was "supported by substantial evidence and * * * arrived at in accordance with law." The Committee's petition does not appear seriously to contest this conclusion.

The *Leventritt* case is decisive of the issues here sought to be raised

The Committee seeks to distinguish *Niagara Hudson Power Corporation* v. *Leventritt*, 340 U. S. 336 (1951) on two grounds: (1) that unlike Niagara Hudson Power Corporation United is to continue in existence and there is no reason not to permit the warrants to remain outstanding; and (2) that the continued existence of the warrants does not take away anything from the stockholders unlike the Niagara Hudson situation in which cash was reserved to pay the warrant holders such compensation, if any, as might be awarded them.

The Committee's first contention is without merit. It was not the fact that Niagara Hudson was to be dissolved that necessitated the elimination of the warrants in that

case, but the requirements of Section 11(b)(2) of the Act. Had not this been so the warrants, if they had been found to have intrinsic value, could have been exchanged for warrants of Niagara Mohawk Power Corporation, the continuing corporation. The treatment security holders are entitled to receive in a reorganization does not depend on whether the corporation being reorganized is dissolved or continued in existence or on any other corporate devices which may be dictated by tax or other considerations.

> See *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 631, 637-638 (1945);
> *S. E. C.* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 135 (1949).

If the elimination of the warrants without compensation was fair and equitable in the *Leventritt* case, it is equally so here.

The Committee's second argument is also untenable. They say in the Petition (p. 23):

> "* * * The warrant holders are not asking for compensation for the loss of their warrants. There is no suggestion that anything be taken away from the stockholders and given to the warrant holders. The shoe is on the other foot. **United's Plan, by** providing for the forfeiture of the warrants, unquestionably takes something—namely, the value of the warrants, whatever that may be, small or large —away from the warrant holders and gives it to United's stockholders."

It is not true that leaving the warrants outstanding would not take anything away from the Common stockholders. As long as they existed there would be additional administrative expenses such as printing certificates, registrar and transfer agents' fees and expenses, listing fees, replying to letters of inquiry, legal fees, etc. Moreover,

outstanding warrants might be detrimental to future financing and might give rise to costly litigation, particularly if in the future capital distributions are made or stock dividends declared.

Nor is it true that forfeiture of the warrants takes something away from the warrant holders and gives it to the stockholders. The warrants have been found to have no intrinsic value. Therefore, their extinguishment takes nothing of legally recognizable value from the warrant holders and gives nothing to the stockholders. The only thing taken from the warrant holders is the purely speculative market value of the warrants. This Court said in the *Leventritt* case, 340 U. S. 336, 347:

> "* * * We conclude, therefore, that in the present instance the Act does not require proof that the warrants are wholly worthless and without all market value in order to sustain the Commission's judgment that the plan is fair and equitable when it denies participation to them. It is enough that the Commission, within its discretion, has given the warrants careful consideration and that under all the circumstances, including their market value, has found the plan to be fair and equitable within the meaning of §11 of the Act. * * *"

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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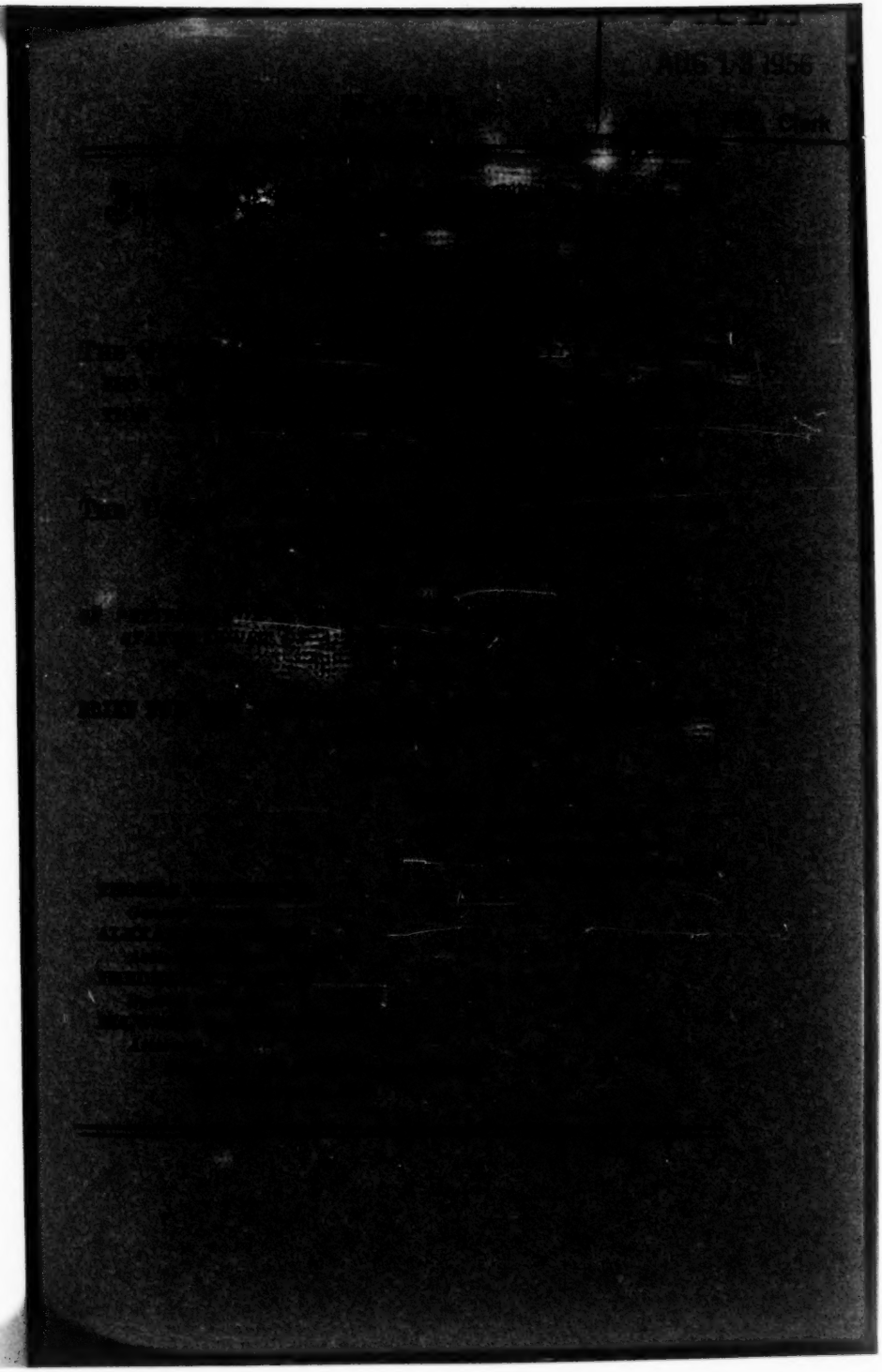
Dated: August 9, 1956.



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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 251

THE GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION AND ALFRED A. BIDDLE, PETITIONERS

v.

THE UNITED CORPORATION AND THE SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 232 F. 2d 601 (Pet. App. 51a). The opinion of the District Court is reported at 128 F. Supp. 725 (Pet. App. 25a). The Findings and Opinion of the Securities and Exchange Commission ("Commission") are set forth in Holding Company Act Release No. 10614. Portions thereof are printed in Pet. App. 1a *et seq.*

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1956 (Pet. App. 64a). The petition for a writ of certiorari was filed on July 13, 1956. This Court has jurisdiction under 28 U. S. C. § 1254 (1).

STATUTE INVOLVED

Relevant provisions of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79 *et seq.* are set forth in the petition, pp. 3–6.

QUESTIONS PRESENTED

The Securities and Exchange Commission approved a voluntary plan, filed pursuant to Section 11 (e) of the Public Utility Holding Company Act of 1935, to effectuate compliance with an earlier order entered under the integration and corporate simplification provisions of Section 11 (b) of that Act. This plan provided, *inter alia*, for the elimination without compensation of worthless option warrants in a registered holding company. The questions presented are:

1. Were such warrants, as the Commission and both courts below determined, an undue and unnecessary complexity in the corporate structure of that registered holding company, to be eliminated under Section 11 (b) (2) of the Act?

2. Can such warrants be eliminated even though it was contemplated that the company might eventually cease to be a registered holding company by becoming an investment company?

STATEMENT

Petitioners seek review of a judgment of the Court of Appeals for the Third Circuit affirming an order entered by the District Court for the District of Delaware on March 7, 1955, which enforced an order of the Securities and Exchange Commission approving a voluntary plan filed with the Commission in 1949 by The United Corporation ("United") under Section 11 (e) of the Public Utility Holding Company Act of 1935 (the "Act"), 15 U. S. C. 79k (e). The only parts of the order involved in this proceeding are those relating to the cancellation of the option warrants of United.

In 1943 United controlled a vast network of public utilities. Its portfolio of public utility securities, according to United's books, amounted to almost 150 million dollars,[1] and it was registered as a holding company with the Commission under the Act.

By order dated August 14, 1943,[2] pursuant to Section 11 (b), the Commission directed, *inter alia,* that United "change its present capitalization to one class of stock, namely, common stock", and that it "take such action, in a manner consistent with the provisions of the Act, as will cause it to cease to be a holding company." The order contemplated the issuance of new common stock[3] and the elimination of all the securities other than the new stock.

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[1] *The United Corporation*, 13 S. E. C. 854, 861.
[2] Holding Company Act Release No. 4478.
[3] *The United Corporation*, 13 S. E. C. 854, 900.

Through consummation of successive plans[4] approved by the Commission in compliance with this order, United completed the retirement of its preference stock in 1949 and divested itself of holdings of various subsidiary companies. Although the recapitalization ordered in 1943 was not effected as originally contemplated, the various plans adopted, including the present plan, accomplish the same objective.

The final plan was filed by United for the purpose of effecting complete compliance with the Act by divesting itself of control over all public utility companies, further simplifying its capital structure by cancellation of the outstanding option warrants to purchase common stock and limiting its structure to the single class of common stock, and transforming itself into an investment company. After due notice, the Commission held hearings at which United, common stockholders, and option warrant holders were represented. Thereafter, it issued its Findings and Opinion[5] concluding that the plan, if modified in certain respects, would satisfy the statutory requirements. These modifications were made and by order dated June 26, 1951,[6] the Commission approved the plan as fair and equitable and necessary to effectuate the provisions of Section 11 (b). At the times when the plan was

[4] Compliance by a series of plans rather than one over-all plan was approved in *Phillips* v. *S. E. C.*, 153 F. 2d 27 (C. A. 2).

[5] *The United Corporation*, Holding Company Act Release No. 10614. Extracts from the Commission's opinion are set forth in the Petitioner's Appendix (pp. 1a *et seq.*).

[6] *The United Corporation*, Holding Company Act Release No. 10643.

filed and when the Commission approved it, United was a registered holding company controlling two subsidiary companies.

The Commission found that there was no reasonable expectation in the foreseeable future that United's earnings and assets would be such that the market price of its common stock would increase sufficiently to give the warrants a recognizable value.[7] The Commission's opinion discusses the special nature of the interest represented by the warrants and the extremely tenuous rights they confer. It points out that the right to buy common stock at $27.50[8] per share applies to the common stock of United "as such stock may be constituted at the time of purchase * * * irrespective of any change * * * by way of payment of stock dividends, sale, exchange or other disposition of any class of stock of the Company." The Commission concluded that the holders of the

[7] In reaching this conclusion, the Commission took into account judicially approved standards of valuation. *Niagara Hudson Power Corp.* v. *Leventritt*, 340 U. S. 336; *In re Commonwealth & Southern Corporation*, 184 F. 2d 81 (C. A. 3), certiorari denied, 340 U. S. 929. It considered opinion evidence submitted by United and by petitioners, the record facts concerning the assets of the system and the earnings of United's portfolio securities, the market history of United's common stock, and the exhibits submitted on behalf of petitioners showing changes in net asset values and in common stock market prices of closed-end management investment companies selected by petitioners' witness.

[8] Petitioners incorrectly speak of the exercise price as $19.25; in fact it is $27.50. They urge, contrary to the terms of the warrants, that the figure should be reduced to $19.25 because of a previous capital distribution. The Commission never reached that question since it found that the warrants were without value at either figure.

warrants "are not entitled, under the standards of fairness and equity, to any participation in the reorganization of United"; that the continuance of the warrants, "representing as they do such an extremely tenuous right, would be inherently deceptive to investors and perpetuate in the corporate structure useless and unnecessary complexities, in contravention of the requirements of Section 11 (b) (2)"; and that "elimination of the option warrants as proposed by the plan is appropriate under the standards of the Act" (Pet. App. 21a).

The Commission's approval of the cancellation of the option warrants (and of proposed amendments to the charter and by-laws, not here in issue) was made conditional upon the entry of an enforcement order by an appropriate United States District Court. Certain common stockholders of United (Downing, Phillips, et al.) filed a petition for review of the Commission's order in the Court of Appeals for the District of Columbia Circuit. Petitioners here were permitted to intervene in the review proceeding over objections of the Commission and United. The Court of Appeals, believing that it had jurisdiction to review the cancellation of the option warrants, examined the matter on its merits and affirmed the Commission's order.[9]

Petitioners thereupon applied to this Court for review, raising the same grounds they now present. They also sought certiorari—reversing their position in the Court of Appeals—on the ground that the Court of Appeals had no jurisdiction over this phase of the

[9] *Downing* v. *S. E. C.*, 203 F. 2d 611, 624 (C. A. D. C.).

plan. This Court granted certiorari "limited to the question as to the jurisdiction of a court of appeals or a district court to review orders of the Securities and Exchange Commission."[10] The Court then held that the Court of Appeals had jurisdiction under Section 24 (a) of the Act, 15 U. S. C. 79x (a), to review all the questions tendered to it, excepting those pertaining to the elimination of the option warrants and to certain amendments to the charter and by-laws of United which, under the Commission's order, would become operative only upon the entry of an enforcement order by an appropriate United States District Court. On March 1, 1954, the Court of Appeals amended its earlier judgment accordingly.

Thereafter, petitioners and other warrant holders filed with the Commission an application to reopen the hearings and for leave to adduce additional evidence. After full consideration of briefs and oral argument, the Commission, on August 17, 1954, entered a Memorandum Opinion and Order denying the application.[12]

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[10] 346 U. S. 810. A petition for certiorari by the stockholders was denied, 346 U. S. 930.

[11] *General Protective Committee* v. *S. E. C.*, 346 U. S. 521, 529.

[12] *The United Corporation*, Holding Company Act Release No. 12621. The Commission found that the arguments presented by the warrant holders were in all essential respects the same as those which had been fully explored and considered by the Commission in connection with the 1951 order approving the plan, and that the steps which United had taken to effectuate compliance with the Act, as contemplated at the time of the 1951 order, had not affected either the power to require, or the appropriateness of requiring, elimination of the option warrants from United's capital structure.

On October 11, 1954, the Commission filed its application for enforcement in the District Court. Petitioners and other warrant holders filed objections and were heard in oral argument. The district judge filed his opinion on January 17, 1955, 128 F. Supp. 725 (Pet. App. 25a) and entered his order enforcing the plan on March 7, 1955 (Pet. App. 44a). Petitioners appealed to the Court of Appeals for the Third Circuit, and on April 16, 1956, that Court affirmed the order of the District Court (Pet. App. 51a).

ARGUMENT

The Commission, a District Court, and two Courts of Appeals have held that the plan is fair and equitable, that the option warrants are valueless, and that they should be eliminated as being deceptive to investors and constituting an unnecessary complexity. These holdings conform with the decisions of this Court. They present no conflict or inconsistency whatsoever with the ruling of any lower court. Moreover, they are correct and there is no need for further review.

1. The questions now presented are the same as those heretofore presented to this Court in a petition for certiorari filed by these petitioners in an earlier phase of these proceedings, but review was not granted. In 1953, when the Commission's order was affirmed by the Court of Appeals for the District of Columbia Circuit under the mistaken view that it had jurisdiction to decide the questions relating to the treatment of the option warrants, these petitioners filed a petition presenting, *inter alia*, essentially the

same issues now raised in this Court. In limiting its grant of certiorari simply to the question of the review jurisdiction of the Court of Appeals, this Court, in effect, denied review of the other issues. *General Protective Committee* v. *S. E. C. et al.*, 346 U. S. 810. We do not urge that the matter is now *res judicata;* but we do believe it of some significance that this Court has already had the opportunity to consider the questions now presented and has declined to do so.

2. Petitioners' contention with respect to the statutory power of the Commission to require the elimination of the option warrants conflicts with the clear language of the statute. Section 11 (b) makes it the duty of the Commission to require *every* registered holding company to comply both with the integration provisions of subsection (1) *and* with the corporate simplification provisions of subsection (2). Petitioners' thesis that, because United had contemplated compliance with Section 11 (b) (1) by becoming an investment company, it ceased at once to be subject to Section 11 (b) (2) is contrary to this double mandate.

The plain jurisdictional fact is that at the time of the entry of the Commission's order United was actually a holding company and was so registered, and by virtue of that status was subject to all the provisions of the Act, including Section 11 (b) (2).[13]

[13] Petitioners speak of United's present status as an investment company, ignoring the fact that the Commission order approving the plan was entered five years ago and that the order with which the plan was designed to comply was entered thirteen years ago. It was, of course, pursuant to the latter order (of 1943) that United took the necessary steps to cease to be a holding company.

That compliance with a portion of the 1943 order and with Section 11 (b) (1) was obtained through transformation into an investment company did not in any way relieve United from its obligation to comply with the remainder of the 1943 order and with Section 11 (b) (2), nor did it relieve the Commission of its obligation to require such compliance. It is highly unlikely that Congress intended that a company go forth from under the jurisdiction of the Act and retain within its structure the very abuses which Section 11 (b) (2) was designed to eliminate,[14] but acceptance of petitioners' thesis would lead to that very result; any registered holding company, merely by declaring its ultimate intention of becoming an operating utility or investment company, could automatically insulate itself from the significant simplification requirements of Section 11 (b) (2).[15]

[14] Petitioners' discussion of the legislative history (Pet. 12) is inaccurate. The statement by Congressman Eicher was his comment on a proposal which never became law. S. 2796 contained a proposed section 11 (b) (3) which provided a five-year period within which the holding companies could make their own arrangements to cease to be such. Under that proposal, the Commission could make no move against them during the five-year period. H. Rep. No. 1318, 74th Congress, 1st Session, p. 50. That section was omitted from the Act as passed, but it is the provision to which the remarks of Congressman Eicher were addressed. He merely pointed out that if, within the five-year period in which it was contemplated that the Commission would be impotent, a holding company ceased to be a holding company, obviously the Commission would then have no jurisdiction over it, and it could retain intact its "intricate and confusing" structure. See this Court's discussion of the legislative history in *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90, 114–115.

[15] Petitioners suggest (Pet. 14) that the Investment Company Act of 1940, under which United was to operate, favors option

Petitioners also contend (Pet. 13–14) that Section 11 (b) (2) can no longer apply to this case since it refers to simplification of "system", rather than corporate, structures, and United contemplated that under the 1943 order it would cease being part of a holding company "system." This argument, too, overlooks the cardinal fact that, at all times relative to the questions presented here, United was still a registered holding company and Section 2 (a) (9) of the Act defines a "holding-company system" to mean "any holding company, together with all its subsidiary companies * * *." Hence, undue and unnecessary complications in the corporate structure of a holding company would by the same token "complicate the structure * * * of such holding-company system". See also *infra*, p. 17. In addition, the other provisions of the Act, particularly Sections 1 and 7, show Congressional concern with the evils and abuses stemming from the issuance of securities by holding companies and their subsidiaries when such securities are based on fictitious or unsound asset values and not appropriately adapted to their earning power. Since it is proper to take these other sections of the Act as interpretative guides to the standards of Section 11 (b) (2) (*American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U. S. 90, 105) it seems clear that petitioners' narrow reading of Section 11 (b)

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warrants. The contrary is true. Congress expressly provided in Section 18 (d) of the Investment Company Act that, with the exception of an exchange in connection with a reorganization, an investment company is not permitted to issue option warrants expiring later than 120 days from the date of issuance.

(2)—to reach only holding companies intending to remain such indefinitely—is incorrect.

3. Petitioners argue that, absent dissolution, there is no unfairness in permitting the warrants to remain outstanding, for, unlike the situation in the *Niagara* case,[16] nothing will be taken away from the common stockholders (Pet. 23). In the first place, this contention ignores the requirement of Section 11 (b) (2) that unnecessary complexities be completely eliminated; and there should be little doubt that a security which lacks any recognizable value is such a complexity (see *infra*, pp. 16–17). Had the warrants had any recognizable value for reorganization purposes, the "fair and equitable" standard would require that compensation be allowed for their elimination; but that question is separate and distinct from the statutory mandate that an unnecessary complexity be eliminated.

Secondly, petitioners concede (Pet. p. 22) that, under the decision in *Niagara*, had United been dissolved the warrant holders would not have been entitled to any participation in its assets. But the fact that United was not dissolved should not make any difference. This Court has ruled that the measure of a security holder's right to participate in a reorganization is not dependent upon the particular method of reorganization chosen. A leading case states that values should not "be made to depend on whether the Commission, in enforcing compliance

[16] *Niagara Hudson Power Corporation* v. *Leventritt*, 340 U. S. 336.

with the Act, resorts to dissolution of a particular company in the holding company system, or resorts instead to the devices of merger or consolidation, which would not run afoul of a charter provision formulated years before adoption of the Act in question." *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 637–638.[17]

In *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523, 536–542, both preferred and common stocks were denied participation in a reorganization notwithstanding that the corporation was to continue in existence.[18] Certainly, option warrant holders who by the terms of the warrants are expressly denied any rights as stockholders, cannot be expected to be treated with greater solicitude than the owners of preferred or common stocks whose anticipations are just as perpetual, and whose rights are more substantial.

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[17] In *S. E. C.* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, an effort was made, as here, to distinguish the *Otis* case on the ground of a difference between a "genuine liquidation" and one where the "enterprise continued essentially unchanged" (338 U. S. at 132). This Court rejected that distinction, reaffirming its statement in the *Otis* case that its decision "does not lie in the fact that the business of Power continues in another form" (338 U. S. at 133). The Court also pointed out that the result in *Schwabacher* v. *United States*, 334 U. S. 182, likewise did not depend "upon the fact that the merger left a continuing enterprise" (338 U. S. at 134).

[18] See also *Standard Gas & Electric Co.*, 59 F. Supp. 274 (D. Del.), reversed on other grounds, 151 F. 2d 326 (C. A. 3), certiorari denied, 327 U. S. 796, where the common stock was denied participation and the corporation was to continue in existence. See also *Southern Colorado Power Co.*, 14 S. E. C. 115, 125, enforced without opinion (D. Colo.), affirmed *sub nom. Dismuke* v. *S. E. C.*, 147 F. 2d 679 (C. A. 10). We know of no ruling to the contrary.

That petitioners are in a position to make the contention they do is purely fortuitous. United chose to commence compliance with Section 11 (b) and the 1943 order by first retiring its preference stock through exchanges of portfolio securities rather than by undergoing a recapitalization followed by distributions of the portfolio to holders of the new common stock. It next proceeded to dispose of control of its subsidiaries, and the matter of the warrants was left until almost last. Had a complete recapitalization been effected as the 1943 order contemplated,[19] the present contention of the warrant holders would have been unavailable. Compliance with certain portions of an order in a sequence chosen by the management does not terminate its obligation to comply with the remainder, or grant security holders special rights which they would not have had if a different sequence had been followed.

4. Equally without merit is petitioner's related argument that the cancellation of the warrants presents a question of unauthorized "forfeiture" of property rights. This Court has long held that the basic test of fairness and equity in corporate reorganizations is whether each security holder, in the order of his priority, receives the equitable equivalent of the rights surrendered. In the reorganization of a sol-

[19] *The United Corporation*, 13 S. E. C. 854, 900. While the court below did not discuss the question, it is arguable that the 1943 order, which has long since ceased to be subject to review, may well be *res judicata* with respect to this issue since it required United to "change its present capitalization to one class of stock, namely, common stock."

vent corporation pursuant to Section 11 (e) of the Act, the rights surrendered are valued as in a going concern. Investment value is the test, not market value. Where the security represents no more than an improbable or conjectural interest, participation must be denied notwithstanding charter provisions or state law. *Otis & Co.* v. *S. E. C.*, 323 U. S. 624; *S. E. C.* v. *Central-Illinois Securities Corp.*, 388 U. S. 96; *Niagara Hudson Power Corp.* v. *Leventritt*, 340 U. S. 336. See also *Schwabacher* v. *United States*, 334 U. S. 182. This is true not only of option warrants, but of common and preferred stocks as well.[20] Contrary to petitioners' statement that "a new principle of law will have been established" (Pet. 15),

[20] This has been the uniform tenor of decisions under the Act as well as the rule in bankruptcy reorganization. *Central States Power and Light Corp.*, 74 F. Supp. 360, 361 (D. Del.) (preferred and common stocks); *Standard Gas & Electric Co.*, 59 F. Supp. 274, 283 (D. Del.), reversed on other grounds, 151 F. 2d 326 (C. A. 3), certiorari denied *sub nom. Guaranty Trust Co.* v. *S. E. C.*, 327 U. S. 796 (common stock); *Jacksonville Gas Co.*, 46 F. Supp. 852, 857 (S. D. Fla.) (common stock). *Cf. Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523, 536–542). Other cases under Section 11 (e) of the Act in which common stockholders have been denied participation because they had no measurable investment value in terms of the reasonably prospective earnings are: *Indiana Service Corp.*, Holding Company Act Release Nos. 7054, 7086, enforced without opinion (N. D. Ind.), appeal dismissed without opinion *sub nom. Propp* v. *S. E. C.* (C. A. 7); *Interstate Power Co.*, Holding Company Act Release Nos. 7143, 7159, enforced, 71 F. Supp. 164 (D. Del.); *Spokane Gas & Fuel Co.*, Holding Company Act Release No. 6065, enforced without opinion (E. D. Wash.); *Seattle Gas Co.*, Holding Company Act Release No. 7128, enforced without opinion (W. D. Wash.).

the order under review is squarely in line with the decisions of this Court.

Although petitioners do not directly challenge the findings of the Commission and of the courts below that the warrants are worthless, they refer to them as if they had some value. They speak of a "conceded" value (Pet. 9, 19, 21, 22). However, neither United nor the Commission recognized any value. The "value" to which petitioners advert relates to past market prices when there was some speculative trading in the warrants (Pet. 9). This Court has stated, however, that "because warrants are among the lowest priced of all securities and because their market price tends to fluctuate with the market price of the stock to which they are related, they permit speculation on market trends with a minimum investment. A purchaser thus may be willing to pay a nominal price for a warrant which has no investment value, on the mere chance that it may be saleable in a rising market." *Niagara Hudson Power Corp.* v. *Leventritt*, 340 U. S. 336, 345–346.[21]

[21] The Commission found that there was no reasonable expectation that, over the foreseeable future, United's earnings and assets would be such that the market price of the common stock would increase so as to give the warrants a recognizable value. However, even if, as petitioners argue (Pet. 19), the Commission's judgment might turn out to be wrong, the common stock holders could, nevertheless, prevent the common stock from reaching the exercise price by withdrawing all increments in value that might be credited to earned surplus, whether ordinary income or capital gains, in the form of cash dividends. Indeed, the stockhold-

And it is no longer an open question that a speculative security which on any rational hypothesis has no ascertainable interest in the assets and earnings of an enterprise constitutes a complexity to be eliminated under Section 11 (b) (2) of the Act. In *American Power & Light Company* v. *S. E. C.*, 329 U. S. 90, 104–105, this Court made clear the standards to be followed in ascertaining a "complicated" structure within the meaning of the Act, referring to the legislative history and purpose as well as particular provisions which establish a "code of rules". The court below carefully analyzed this "code of rules" in reaching its conclusion that the warrants were a complexity within the meaning of the Act and should be eliminated.[22]

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ers could retain increments in the enterprise and effectively prevent a resultant increase in value per share by declaring dividends in the form of additional shares of common stock. As noted above, payment of such cash or stock dividends would not reduce the price which a warrant holder must pay in order to exercise his right to purchase common stock.

[22] Petitioners, in purporting to summarize the findings below (Pet. 18–19), significantly omit the Commission's finding that the continuation of the option warrants would "perpetuate in the corporate structure useless and unnecessary complexities, in contravention of the requirements of Section 11 (b) (2)" as well as the discussion by the Court of Appeals as to the meaning of "complexity" concluding that "There can be no doubt that the complication referred to in Section 11 (e) [sic] can properly apply to outstanding warrants which have been found valueless and which by their terms confer an extremely tenuous right upon the holders" (Pet. App. 59a).

CONCLUSION

The petition for a writ of certiorari should be denied.

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AUGUST 1956.

U. S. GOVERNMENT PRINTING OFFICE 1956

Office - Supreme Court, U. S.
FILED
AUG 22 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 251

THE GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION and ALFRED A. BIDDLE,

Petitioners,

v.

THE UNITED CORPORATION and THE SECURITIES AND EXCHANGE COMMISSION,

Respondents

PETITIONERS' REPLY BRIEF

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In the Supreme Court of the United States

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The United Corporation and the Securities and Exchange Commission,

Respondents.

PETITIONERS' REPLY BRIEF.

This reply brief is filed to correct certain inaccuracies in the briefs of United and the Commission in opposition to the petition for certiorari.

For the reasons stated in note 1, page 7, of the petition, the 1943 order of the Commission (which it suggests might even be *res adjudicata*—Commission's brief page 14, note 19) has no bearing on the issue now before the court. While that order may have contemplated the possibility of a new issue of common stock and the elimination of all United's outstanding securities (Commission's brief, page 3), it did not require it, and in fact no new stock has been issued.

Contrary to the Commission's brief (pages 6, 8-9), the Committee's previous petition for certiorari did not present the questions now before this court. The two questions presented by that petition as to which certiorari was not granted were:

"2. Where a simplification plan under Section 11(e) of that act provides for the continued existence (as an investment company) of a corporation which had issued perpetual warrants for the purchase of its common stock (these warrants and the common stock being its only outstanding securities) and also provides for the forfeiture of the warrants, may such a plan be approved merely on the ground that the warrants 'unduly or necessarily complicate' the corporate structure of the corporation, where there is neither a finding nor evidence that the warrants complicate the structure of a holding company system?

"3. Did the Court below abuse its discretion by approving a corporate simplification plan (theretofore approved by the Securities and Exchange Commission) filed pursuant to a statute providing for agency and court approval only if a plan meets specified requirements, when, due to events subsequent to approval of the plan by the agency, the plan at the date of court approval no longer meets such requirements?"

Petitioners do not concede (contrary to the Commission's brief, page 12) that, had United been dissolved its warrants could properly have been forfeited. United has not been dissolved and there is no occasion to speculate as to what might have been the rights of its security holders had it chosen to adopt a different course.

United's brief (pages 5-6) cites five cases as authority for the proposition that long-term warrants are undue complexities in the structure of a public utility holding company. In not one of those cases was the issue of complexity raised before any court. The only issue as to the warrants before each court was whether the treatment of the warrant holders was fair and equitable. None of these court decisions even remotely parallels the decision of the Commission and the two

lower courts here that warrants "complicate" a capital "structure" and must be forfeited solely to protect future investors from being tempted to buy them. Although they try to justify the decision below on other grounds and do not in so many words confess error, neither United's brief nor the Commission's brief attempts either to deny that such was the holding below or to support this holding.

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